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NORTH CAROLINA REPORTS,

EMBRACING

"NOTES OF A FEW DECISIONS IN THE SUPERIOR COURTS OF THE STATE OF NORTH CAROLINA, AND IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH CAROLINA,"

BY FRANCOIS XAVIER MARTIN.

—ALSO—

"REPORTS OF CASES ADJUDGED IN THE SUPERIOR COURTS OF LAW AND EQUITY, COURT OF CONFERENCE AND FEDERAL COURT FOR THE STATE OF NORTH CAROLINA, FROM THE YEAR 1797 TO 1806,"

BY JOHN HAYWOOD, ESQ.,

Late one of the Judges of the Superior Courts of Law and Equity—Vol. 2.

SECOND EDITION,

WITH NOTES REFERRING TO SUBSEQUENT ENACTMENTS OF THE LEGISLATURE, AND DECISIONS OF THE COURT OF CONFERENCE AND THE SUPREME COURT, MARGINAL ABSTRACTS, A TABLE OF THE CASES REPORTED, AND A NEW INDEX,

BY WILLIAM H. BATTLE, ESQ.,

One of the Judges of the Superior Courts of Law and Courts of Equity of the State of North Carolina.

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1896.

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ADVERTISEMENT TO THE SECOND EDITION.

It is well known, at least to the members of the legal profession in this State, that several of the earlier volumes of our Reports are nearly, if not quite, out of print, and that, for some time past, it has been difficult to procure them. To those who are at all conversant with the subject, it is needless to advert to the importance, if not absolute necessity, of having a complete series of the reported decisions of our State Courts for the use and guidance of those who are concerned either in the practice, or the administration, of the law. This consideration led the Editor to examine these older Reports with a view to their republication. In this examination he found that many cases were reported very nearly in the same terms by different reporters. It then occurred to him, that by omitting such cases in all but one book, and by making some other alterations that would rather add to, than impair, the value of the work, several of the volumes of these Reports might be condensed so as to reduce their number and thereby diminish the expense of procuring them. Pursuing this plan, the Editor has been enabled to compress seven volumes into three, of which Martin's and the second volume of Haywood's Reports form the first, Taylor's and Conference Reports the second, and the two volumes of the Carolina Law Repository and the North Carolina Term Reports the third. The first volume of Haywood's Reports and the first and second of Murphey's Reports are not touched, though the cases contained in them were decided during the period embraced by those above mentioned, because the copies of them which have been published are not nearly exhausted, and there will not, for some time to come, be any difficulty in obtaining them. This explanation will also render obvious the reason why the cases reported in either of them, and likewise in the other Reports, are omitted in the latter. Besides the process of condensation, to which the present Reports have been subjected, they have been attempted to be improved by adding a marginal abstract to each case that is not itself but a mere abstract of the point decided, and by annexing a note when required, containing a reference to such legislative enactments or judicial decisions as bear upon the point adjudged, or the doctrine embraced, in the case. Whether the *execution* of the present undertaking has any claim to favour, it is for the public to decide, but the Editor feels confident that its *design* will meet with a favorable reception from that liberal profession to which he has the honor to belong.

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MARTIN'S REPORTS.

VOL. I.

FAYETTEVILLE, *April Term*, 1795.

JOHN INGRAM, Assignee, &c. v. JOHN HALL.—Page 1.

NOTE.—See this case reported at length in 1 Hay. Rep., 193, and see also the note thereto. As to the proof of attested deeds and other sealed instruments, see the note to *Clements & Co.* v. *Eason & Wright*, 1 Hay. Rep., 18, and the cases of *McKinder* v. *Littlejohn*, 1 Iredell's Rep., 66, and *Blume* v. *Bowman*, 2 Ibid., 338.

PERSON v. ROUNDTREE.—Page 18.

NOTE.—See this case reported in 1 Hay. Rep., 378, in a note to ——— v. *Beatty*. See also the note to *Bradford* v. *Hill*, 1 Hay. Rep., 22. *Ingram* v. *Colson*, 3 Dev. Rep., 520. *Lynch* v. *Saunders*, 4 Dev. & Bat., 62. *Ring* v. *King*, Ibid., 164. *Hough* v. *Horn*, Ibid., 228, and *Becton* v. *Chesnut*, Ibid., 335. *Stapleford* v. *Brinson*, 2 Iredell's Rep., 311. *Massey* v. *Belisle*, Ibid., 170.

HALIFAX, *April Term*, 1789.

MERRITT'S EX'RS v. MERRITT.—Page 18.

In detinue for a slave, the plaintiff may proceed for damages and costs though the slave be restored after issue joined.

Detinue. This was a case agreed, viz: the plaintiff had brought a suit in detinue for a negro in the possession of the defendant, and after issue joined, the defendant restored the negro to the plaintiff; if the court were of opinion that the plaintiff could proceed for damages and costs, or costs

alone, then there should be judgment for costs: if otherwise a nonsuit should be entered.

Davie, for plaintiff.

Iredell, for defendant.

Per Curiam, after this case had been twice argued.—The plaintiff may proceed for her damages and costs, notwithstanding the negro has been restored to her—and judgment for costs.

Note.—See the case of *Morgan* v. *Cone*, 1 Dev. & Bat., 234, which refers to and expressly overrules this case, and decides that, if, after action brought and issue joined, the plaintiff gets possession of the thing sued for, that fact may be pleaded *puis darrein continuance*, in abatement of the suit, but *it seems* that it would not be a good plea in bar. See also *Merrit* v. *Warmouth*, 1 Hay. Rep., 12. *Flowers* v. *Glasgow*, Ibid., 122, and *Shepard's Adm'r* v. *Edwards*, 2 Hay. Rep., 186.

BARROW'S EX'RS v. BAKER.—Page 19.

The proviso in the act of 1785 (Rev., ch. 233, sec. 1) requiring the attorney of the appellant to certify the reasons for the appeal, does not relate to actions of debt.

Appeal, on a rule to shew cause why an appeal from the Halifax County Court should not be dismissed; the reasons for the appeal being signed by the defendant himself, and not by his attorney, in an action of debt.

It was determined by the court, that the proviso, in the act of 1785, 2, 548, relates only to the cases mentioned in that act, and operates as an exception to that act only; therefore as from actions of debt, an appeal lay by 2, 1777, 2, 82, 348, it was not in the purview of this act.

Iredell, for the rule.

Davie, contra.

Note.—This proviso is now repealed, 1 Rev. Stat., ch. 1, sec. 2, and ch. 4.

EDENTON, *May Term*, 1789.

ANDERSON'S ADM'RS. v. ANDERSON.—Page 19.

Where no declaration was filed by the plaintiff, nor any plea by the defendant at the first term of the County Court, and at the second term the defendant moved to dismiss the suit for want of a declaration, the court refused the motion, saying it was a matter of discretion under the act of 1786, (1 Rev. St., ch. 31, sec. 62) and permitted the declaration to be then filed.

In this case, the defendant in the County Court did not plead the first term; no judgment was taken. The second term the defendant, by his attorney in fact, moved to dismiss the cause for want of a declaration. Whilst the court was considering the case, the attorney for the plaintiff entered judgment by default; the court ordered a nonsuit, and the plaintiff appealed, and this term cause was shewn against striking out the default, and after much argument:

WILLIAMS, J., said he would consider the words in the act of assembly,* "SHALL *dismiss*," as if they had said "MAY *dismiss*"—and they were not obliged to dismiss it, and if the plaintiff was ready with his declaration they would not dismiss the cause, at the second term.

SPENCER, J., concurred.

ASHE, J., said he thought the defendant might take the same advantage the second term that he could do the first. That he thought it hard the defendant should be a sufferer by the direction of the court, to be obliged to enter a *nonsuit* instead of dismissing the cause, and they all agreed that the default should be struck off, and the nonsuit likewise; and the cause sent down in that condition to the County Court.

All the Judges present.

NOTE.—See *Dalzell's Adm'r* v. *Stanley's Ex'r*, post, 46.

*1786, 14, 5, 585.

EDENTON, *May Term*, 1789.

MORRIS, WILLING & SWANWICK v. STOKES.—Page 20.

This was a default and enquiry. The court ruled that evidence might be given of the difference of exchange between this country and Philadelphia, and in the charge (as bills had not been usually drawn in Edenton, and no one knew the exchange,) the court said to the jury that they might discover the exchange by attending to the value of hard money in this country, and knowing what dollars passed at in Philadelphia.

SPENCER, J., and WILLIAMS, J., present.

NOTE.—See *Elmsly* v. *Lee*, post, 25.

EDENTON, *May Term*, 1789.

SAVAGE'S EX'RS v. RICE.—Page. 20.

In taking depositions where a party lives out of the State, notice may be given to such absent party or to his attorney in court.

The court, after argument, said that they had considered the case, and were of opinion, and so laid down the rule, that where a party lives out of the State, the adverse party may give notice to such absent party, or his attorney in court, as he may choose.

This opinion was delivered by WILLIAMS, J., who said it was the court's opinion : the other two Judges being present, and assenting tacitly.

In every instance, except where a witness is about to remove (in which case ten days' notice is to be given by act of Assembly*) the court will fix the time to be given on such notice.

NOTE—See *Maxwell* v. *Holland*, 1 Hay. Rep., 302, and also 1 Rev. Stat., ch., 31, sec. 68 & 69.

*2, 1777, 2, 41, 306.

SURVIVING PARTNER OF STANLY & GREEN v. CUMMINS.—Page 20.

A note for the payment of £60 specie, in tobacco at the specie price, is a note simply for the payment of so much money; and in ascertaining the damages in a suit on such note the jury may consider the difference in the value of money.

In this case there was a default, and at this May Term, 1789, at Newbern, on executing the enquiry, the note produced, appeared to be for the payment of £60, specie, in tobacco at the specie price, if not paid within two months; but if within two months, then at 40s. per hundred for tobacco. The note was made in December, 1783.

WILLIAMS, J., said it was simply a demand for so much money.

The Attorney General, who appeared for the plaintiff, attempted to shew that a damage might arise to the plaintiff, who was in trade, by his not receiving the tobacco which was an exportable article; but the court did not give into it, and pressed the Attorney to say in what manner he would direct the jury himself; who said if he had the power, he would direct the jury to consider the depreciation of money in order to do justice.

WILLIAMS, J., said the jury were sworn to ascertain the damages sustained, and they might consider the difference in the value of money.

The other Judges assented, but without charging the Jury.

All the Judges present.

NOTE.—Such a note would not be negotiable. See *Hodges* v. *Clinton*, post, 76, and the cases there referred to in the note.

SALISBURY, *September Term*, 1789.

WILLIS v. SMITH.—Page 21.

The purchaser of the lands of H. E. McC., under a sale by the commissioners of confiscated property, was allowed to shew as good evidence of a title in fee simple, the long possession of H. E. McC., under a deed which he had carried off, the records of the register's office having been destroyed.

This was an ejectment brought on a deed from the State for lands sold by the commissioners of confiscated property, formerly belonging to H. E. McCulloch. The counsel for the plaintiff set up their deed from the date, and then relied on the possession of McCulloch as evidence of the fee; the original deed to McCulloch, being carried by him beyond sea, and the records in the Register's office destroyed. They also shewed a plot, and an abstract taken in a list of McCulloch's deeds, and proved the execution of a deed to McCulloch, with possession for several years; the abstract was sworn to and the plot also. This evidence was objected to by the defendant's counsel, requiring the original deed to be produced.

The counsel for the plaintiff relied upon Buller, 228, 254; Salk., 288; 1 Mod., 117; Douglass, 572; Viner Evid., 231, 2, 3, 4. As to what possession evidence of a fee, they produced and relied on the case of Cowper, 595; Buller, 103; Salk., 421.

PER CURIAM. The evidence is perfectly admissible under the circumstances of this case—and the possession is good evidence of a fee till the contrary appear.

Moore and *Davie*, for the plaintiff.
Martin, *McCay* and *Stokes*, for the defendant.

EDENTON, *November Term*, 1789.

WATSON v. WRIGHT.—Page 21.

Where a party prays an appeal from the County Court, but does not file the papers, and afterwards moves for a writ of error and files a transcript of the record, the court refused, upon the motion of the other party, to dismiss the appeal, saying that they had nothing before them, and that there was no remedy in such case but to sue on the appeal bond.

Appeal. On a writ of error and an appeal on the same cause by *Watson*, it appeared that *Wright* had recovered *versus Watson* in the County Court, and *Watson* appealed to May Term, 1789, but did not file the papers. He afterwards gave notice that he intended to move for a writ of error, at November Term, in the same case: and at November Term, *Iredell* moved for a writ of error, assigned errors, and filed a transcript of the records which had been taken in the appeal. *Alfred Moore*, Attorney General, moved to dismiss the appeal, and to have the 12½ per cent., urging that the cause was not before the County Court: being removed by the appeal, therefore a writ of error could not regularly go.

The Court refused to dismiss the appeal: saying they had nothing before them, and that there was no remedy in case the appeal was not brought up, but to sue the appeal bond.

NOTE.—As to the manner in which appeals from the County to the Superior Court are now to be carried up, and the remedy provided for the appellee in case the appellant does not carry up his appeal within the time prescribed by law when he undertakes to carry it up, see 1 Rev. Stat., ch. 4, sec. 3, 4, 5 & 6.

WILMINGTON, *December Term*, 1789.

JOHN COLHARDIE v. AUGUSTIN STANTON.—Page 22.

An action on the case lies on a sealed instrument unattested, and not having the words "witness my hand and seal."

This was the case of a promissory note, under seal of

wafer and paper. The note was given to one *Halfey*, who endorsed it some other person, &c., &c., to the plaintiff. As this was an action on the case, *Williams*, for defendant, objected to the instrument being offered in evidence to the jury. It was permitted to go the jury, and the question reserved—and afterwards on argument (the note had not the expression "witness my hand *and seal*") *Williams* said the instrument was before the Court, &c., and relied on *Wood*, 246. *M'Lain* insisted that delivery was necessary and not proved, and cited *Gilb. E.*, 101.

WILLIAMS, J., was clear that it was proper evidence, because the seal is not mentioned in the writing "as witness *my seal*."

SPENCER, J., concurred.

ASHE, J., differed; said it was a deed; it could not be given in evidence.

Judgment for plaintiff.

NOTE.—This case is overruled by *Ingram* v. *Hall*, ante, 1 S. C., 1 Hay. Rep., 193

HILLSBOROUGH, —— *Term*, 178–.

TIMS v. POTTER.—Page 22.

The increase of slaves belongs to the reversioner or remainderman, not to the tenant for life of the mother.

This case was that of a gift of one *Glover* to his daughter, of a negro woman, reserving the use of that negro during his life. Judgment was obtained against *Glover*, and an execution levied on the negro. *Potter* became the purchaser; *Tims* intermarried with the daughter of *Glover*, and after *Glover's* death, brought suit for the wench and her children. On a verdict for the plaintiff, the question, as to the children born during the life estate, was reserved.

The following cases were relied upon for the defendant: Tissin on *Tisser*, 1 P. W., 500. *Nichols* v *Osborn*, 2 P. W., 419. *Taylor* v *Johnston*, Ibid., 506. *Choworth* v. *Hooper*, 82, Brown's Reports det., 1780, 2 Black., 390. Puffendorff, lib. 2, Ch. 4, p. 11. 2, P. W., 42. 1, P. W., 572.

The counsel for the plaintiff combatted these authorities by shewing that the principles upon which they were determined would not apply to the present case. That the devise over in the case of *Tisser* depended on a contingency, &c. In some of the other cases it depended upon a condition. That in the case of money, interest was the sole produce or profit; the principal not impaired thereby; otherwise of a negro: where a use is reserved or devised, the property certainly passed and vested in the donee, as remainderman; the intermediate estate is satisfied by the labor, &c., &c., the doctrine of Puffendorff related to the rights of war, &c., &c.

Moore and *Davie*, for plaintiff.

Iredell and *Hooper*, for defendant.

Ashe, J., and Spencer, J., present, at the last argument. Williams, J., absent, said to disagree.

Spencer, J. This case has been twice ably argued. My mind is fully satisfied, and I am sure without bias. When this case was first stirred, I inclined to be of opinion for the defendant: but when the authorities and reasons were examined, on the second argument, they were evidently inapplicable to the present case. We have taken great consideration of this cause, and are now clearly of opinion, that the remainder carries with it the increase. The intermediate estate is satisfied fully by the *labor* of the negro.—*Labor* is a *use* that may be commanded by the person, who has the estate; *breeding* is the order of nature, not of the master. This use must be such a use as the owner may command. The life estate might exhaust the whole estate, the remainderman would take an incumbrance, instead of a benefit. As to the children being an incumbrance on the life estate, the donee or legatee is a volun-

teer, and people are generally of a different opinion, as to thinking a breeding wench a loss.

Ashe, J. This is a question of great importance; much properly depends upon it, and it is in some measure moved for this reason. We have had it twice solemnly, and I say with pleasure, ably argued—I perfectly coincide in opinion with my brother Spencer, upon the gift, the *jus proprietatis* passed to the donee a mere temporary use, limited by the life of the donor, and *jus possessionis* alone remained. This case has been likened to a devise; there would be no difference, the remainderman is always the principal object of the testator's bounty; and the intermediate estate is well satisfied by the labor—Judge *Spencer* says something was held out to the daughter: this was to be a beneficial estate, carrying with it every possible certainty, this case would admit; thus the increase compensated the loss of value by age, labor, and breeding. It would be in vain to look for cases in point in the English reporters; they never possessed property exactly similar; their villains were not in all respects in the same condition with our slaves. If a person was to hire out a negro for a year, or a number of years, or devise her for a number of years, or for a time uncertain as a life, and this happens every day, would any man say that, in the first case stated, the hirer was to have the issue? yet the counsel for the defendant could not distinguish this case from the present; although it was repeatedly pressed upon them by the counsel for the plaintiff.

Reason, equity and the general opinion, which I suppose rested on professionals, or judicial opinions formerly given, are all strongly in favor of the plaintiff. Men must be permitted to provide for the various conditions of their families, out of this kind of property. In this country, it makes a large part of our estates. It is a common thing to leave some negroes to the wife for life, and to children afterwards; the construction has been uniform ever since the settlement of this country: that the *issue* went to the remainderman; the labor has been all that was intended or understood for

the use or intermediate estate. As I said in the case of hire, the increase revert to the person who has the property; so the increase go to the person who has the *jus proprietatis*, not inconsistent with, but conformable to, the rule.

This construction is founded in justice and policy, as it accommodates this property to the provision of families, and I think it is agreeable to the principles of law. Construction, having obtained for a great length of time, and universal practice ought to be satisfactory evidence of their adoption under legal authority. Therefore enter judgment for the plaintiff.

SPENCER, J. The person who has the remainder surely has the *jus proprietatis;* the person who has the absolute property must have the increase; if the special proprietor could claim it, it must occasion infinite disputes.

The increase cannot be separated from the absolute property. It is a case peculiar to this country. We must have recourse to general principles of justice and policy: and the authority of generally received opinions ought to have great weight, supported by long adoption in cases of property.

NOTE.—The question decided in this case, that the increase of slaves limited to one for life with remainder over will go to the remainderman and not belong to the tenant for life, is fully sustained by the cases of *Glasgow* v. *Flowers*, 1 Hay. Rep., 233, where this case is referred to and shortly reported in a note, and *Erwin* v. *Kilpatrick*, 3 Hawks, 456, and has long been the settled law of the State. But if the facts of the case are properly stated, it was improperly determined upon another point which the facts presented, but which seems not to have been noticed by the court. It was a gift of a chattal either by deed or parol after the reservation of a life estate therein to the donor; and this, according to several adjudged cases, conveyed no interest to the donee in remainder. *Graham* v. *Graham*, 2 Hawks, 322. *Sutton* v. *Hallowell*, 2 Dev., 185. *Morrow* v. *Williams*, 3 Dev., 263. *Hunt* v. *Davis*, 3 Dev. & Battle, 42. Such limitations of slaves are now allowed by act of Assembly. 1 Rev. Stat., ch. 37, sec. 22.

HILLSBOROUGH, *April Term*, 1790.

HALL v. COX.—Page 24.

Cox was bound in a recognizance to appear at October Term, 1789, but did not appear, his recognizance was defaulted. Cox had been convicted at Fayetteville Superior Court of Law, of horse stealing, and suffered the punishment. He appeared this term, and an affidavit was offered, sworn to by himself, to induce the court to remit his recognizance, and was permitted to be read.

All the Judges present.

NOTE.—See the next case.

SALISBURY, *March Term*, 1790.

—— v. KIMBOROUGH.—Page 25.

Kimborough, at the last Term, had got a *dedimus protestatem* to take the testimony of some persons. He had failed in getting the deposition, and the cause came on to trial; when his counsel filed an affidavit of his, to continue the cause.—It was objected that Kimborough had been convicted of passing counterfeited money, and had suffered punishment; this was admitted: but they argued that he ought to be admitted to make oath, on account of the necessity of the case. Granted by the court.

SPENCER, J., and WILLIAMS, J., present.

NOTE.—See the preceding case of *Hall* v. *Cox*.

EDENTON, —— *Term*, 1791.

ARMISTEAD v. ABBALSON.—Page 25.

The plaintiff declared on a covenant to deliver tar and other articles to a certain amount; the defendant pleaded

that he was always ready: the plaintiff could not prove a demand and refusal or neglect, and was nonsuited.

NOTE.—See *England* v. *Witherspoon*, 1 Hay. Rep., 361, and the notes thereto.

EDENTON, —— *Term*, 1791.

EMSLEY v. LEE.—Page 25.

This was a suit on a promissory note to pay £100 sterling, according *to the course of exchange*. The court said this case is not different from bonds for Virginia money, or Whitmill Hill's case and others, and charged the jury to find the exchange at 77 7–9.

N. B. The jury found, however, the real exchange.

EDENTON, —— *Term*, 17—.

MITCHELL v. CLARKE.—Page 25.

Plaintiff may, under the book debt law, (1 Rev. Stat., ch., 15) prove work and labour done by his slaves, and also goods sold and delivered for the use of the defendant by sundry persons and paid for by the plaintiff.

Motion by *Iredell* for plaintiff to prove work and labor done, not by the plaintiff himself, but by negroes which he employed: and goods, &c., sold and delivered for the use of the defendant, by sundry persons and paid for by the plaintiff, under the book debt act.*

Objected by Mr. Attorney General *Moore*, that this is neither within the spirit nor letter of the act, because the work was not done by the plaintiff himself, &c.

But, on a long time taken up in discussing the subject, the court overruled the objection, and admitted the plaintiff to swear.

*1756, 6, 171.

EDENTON, —— *Term*, 17—.

CHARLTON'S EX'RS v. LAWRY'S EX'RS.—Page 26.

In assumpsit for fees due a deceased attorney at law, plaintiff was permitted to prove the account under the book debt law (Rev. Stat., ch. 15) by the testator's books.

Assumpsit, on an account for fees as an attorney. *Iredell*, for plaintiff, moved to prove the account by testator's books under the book debt act ;* to which the court objected, as the record of the business done would be better evidence ; but on hearing *Iredell* contra, who argued on the hardship of the case and a reason suggested by *Johnston*, that the record would not always be the best evidence in such case, because the attorney might enter his appearance without being employed, the court allowed the books to be given in evidence, the sum being under £30.

EDENTON, —— *Term*, 17—.

SMITH v. SMITH'S EX'RS.—Page 26.

Acts of Assembly take effect from the beginning of the session in which they are passed.

It was admitted on both sides, that the testator died during the session, and before the ratification of the act, so that the question was when the act should begin to operate.

Iredell, for the petition insisted, on the authority of many cases he produced, to shew that all the acts of the British parliament take effect as laws from the first day of the session, and therefore *sic hic.*

Johnston, for the defendant in answer, relied on the words and spirit of the Constitution,† that the signing of the Speakers is necessary to give the act the sanction of a law.

*1756, 6, 171.. †Sec. XI., p. 270.

WILLIAMS, J., and SPENCER, J., who delivered their opinions first, concluded with saying that they would not alter the law which had been so long established, and therefore there was judgment for the petitioner.

But ASHE, J., concurred in the opinion of *Johnston*.

NOTE.—See accordingly *Sumner* v. *Barksdale*, Conf. Rep., 111, but it is now provided by the act of 1799 (1 Rev. Stat., ch. 52, sec. 36,) that the acts of the General Assembly shall be in force only from and after thirty days after the termination of the session in which they are passed, and not before, unless otherwise expressly directed in the acts themselves.

HALIFAX, *October Term*, 1787.

TULLOCH'S EX'RS v. NICHOLS and FARMER.—Page 27.

Motion by *Penn* to prove the bond, by examining evidences of the handwriting of the subscribing witness, who was resident of another State. All the bar, except *Johnston*, joined in the argument of this question, being one they wished settled. And the Court determined in favor of the motion.

NOTE.—See *Irving* v. *Irving*, 2 Hay. Rep., 27. *Ingram* v. *Hall*, ante, 1., S. C., 1 Hay. Rep., 193. Note to *Clements & Co.* v. *Eason & Wright*, 1 Hay. Rep., 18, and *McKinder* v. *Littlejohn*, 1 Iredell's Rep., 66.

HALIFAX, *April Term*, 1789.

MAYFIELD v. HAWKINS.—Page 27.

A bill of injunction may be granted, after a former bill for the same cause has been dismissed for not having been served on the defendant in time; but there should be an affidavit of some particular hardship, and no omission on the part of the complainant.

This was a bill of injunction granted, after a former bill of injunction for the same cause had been dismissed, for not having been served on the defendant in time; for which

cause there was a plea in abatement, and on argument the court ordered the plea to be overruled.

Ashe, J., and Williams, J., said that in future they would not allow such a bill to stand, without affidavit of some particular hardship, and that there is no omission on the part of the complainant.

But Spencer, J., was clear that a second injunction might be granted, without any such circumstance of hardship.

Haalifax, *October Term*, 1790.

FERRELL v. PERRY.—Page 27.

Interest in the event of the question, but not of the cause, will not render a witness incompetent.

Detinue, for a negro formerly the property of John Ferrel, the plaintiff's grandfather, who claims him under a gift which was clearly proved.

The defendant claims under a presumptive gift from John Ferrel to William Ferrel, his son-in-law, previous to the gift to the grandson, and on the trial Norwood (who claimed a negro who was given in the same manner and exactly under the same circumstances, though there was no suit against him,) was offered as a witness for the defendant.

Objected by *Davie* for the plaintiff, and to shew that he ought not to be a witness read the case of *Abrams qui tam*, before lord *Parker*, reported by Lucas, which says that where there is a bias, though not an immediate interest, it is a good objection, and also in Morgan's Law Essays, a late case before lord *Mansfield* and justice *Butler*.

But *Moore* condemned the authority of *Lucas*, and contended that the old rule of being immediately interested was the only sure guide, for since the courts have departed from that there has been no landmark, &c.

Of which opinion was the Court, for they said that the present verdict cannot be given in evidence in an action against the witness, &c.

WILLIAMS, J., and SPENCER, J., present.

NOTE.—See *Farrel* v. *Perry*, 1 Hay. Rep., 2, (which seems to be the same case,) and the note thereto. See also *Rowland* v. *Rowland*, 2 Iredell's Rep., 61.

EDENTON, *October Term*, 1792.

MEREDITH v. KENT'S EX'RS.—Page 28.

The deposition of a witness residing in another State may be read, though he be in the State at the time of the trial, and had been summoned in the cause while in the State.

In the course of this trial it was moved by *Stone*, for the defendant, to read the deposition of a witness who resided in Georgia when it was taken, though he was in Bertie county at the time, and had been attending this court as a witness in the cause, but he was not now present.

Objected by *Lowther*, for the plaintiff, who opposed the introduction of the testimony *totis viribus*, upon the ground that this was not the best evidence; as the witness might have been and was actually summoned in the cause, whilst in the State.

But M'COY, J., declared it to be the settled practice to admit the deposition absolutely: as by the residence of the witness in another State, there could be no forfeiture for non-attendance, though summoned.

HALIFAX, *April Term*, 1793.

DEN ON THE DEM. OF WARD v. WARD.—Page 28.

When a deed conveyed the whole estate absolutely to the bargainee, but in the premises, though not in the *habendum*, there was *an exception of the grantor's lifetime in any part or parcel of the land*, it was held that the fee passed immediately to the grantee, and the reservation was void.

Ejectment. In the trial of this cause, a question arose upon a deed of bargain and sale, made to the lessor of the plaintiff, by his father, in the year 1771, of the premises in question, which conveyed the whole estate absolutely to the bargainee; but in the premises of the deed there is an *exception of the grantor's lifetime in any part or parcel of the land;* though this exception is not in the *habendum.* Whether the lessor of the plaintiff took a fee by this conveyance, as a life estate was reserved to the grantor.

Davie, for the defendant, laid it down as an established rule of law that a *fee* cannot be created by deed to take effect or arise *in futuro;* and here he said, the grantee was not to take till after the grantor's death.

Mr. Attorney General *Haywood* entered into a discussion of the doctrine of ases. to shew that the use might be limited to take effect in this manner by the statute of uses*; although it would not have been good at the common law.

But the Court, ASHE, J., and WILLIAMS, J., stopped the Attorney General, saying they differed with him in opinion, with respect to the operation of the statute of uses; but they were clearly of opinion without hearing *Haywood* farther, that here the fee immediately passed to the grantee, and the reservation was void.

NOTE.—See the cases of *den on dem. of Sasser* v. *Blythe*, 1 Hay. Rep., 259, and *doe on dem. of Smith* v. *Grady*, 2 Dev. Rep., 395, which seem to overrule this case.

*27 H. VIII., 10, 208.

NEWBERN, *March Term*, 1793.

WILLIAMS *v.* CABARRUS.—Page 29.

In running a race, one rider may use every fair means to get the track of the other, but neither has a right to strike the other's horse, run on his heels, or do anything of the kind: if one horse get the track of the other, he is not obliged to leave it to save the other's being polled, and if he be jostled or the like so as to lose the track, the one that gave the jostle will be distanced, though he did it to save being polled himself.

The opinion of the judges of a race is not conclusive: the matter may be afterwards examined by a jury upon testimony produced before them.

Where there is a stakeholder, the action lies against him, and not against the losing party, by the party that wins the race.

This was an action upon the case, for money had and received, by the defendant to and for the use of the plaintiff, upon the following case. The plaintiff and Lee Dekeyser made a race to be run the four mile heats, between the Hyder Ali and the Centinel for £500: which was staked by each party in the hands of the defendant, to hold the same, till the event of the race was determined.

The horses were started fairly. The Centinel had the track, but the Hyder bore down upon him, and at the distance of about 150 yards from the start, the Centinel bearing in and having before *roughed* it on the inner side of the tract, was running within the poles which stood at that distance; but his rider checked him short at the pole and drew his head on the outside of it, knocked it down by the inner side of his neck, and *jostled* against the Hyder: who by this stumble, having before rather outran him, entirely took the tract and cleared himself of the Centinel. An article in the race articles said that, whoever rode otherwise than fair, according to the rules of racing, should be considered as distanced, and lose the race.

All the witnesses, except Col. Brown and Mr. Edward Jones, said they thought the horses never touched each other before the Centinel struck the pole. Those two gentlemen were rather of opinion that they did touch before,

and Col. Brown said, he thought the Centinel was borne out of the tract by the superior weight and strength of the Hyder. They all agree, however, that no direct foul play was apparently used.

The question was, whether the Hyder was distanced, as having run unfairly?

Davie, for the plaintiff.

And *Taylor*, for the defendant.

Williams, J., recited the testimony, and then said that in running a race, one rider may use every fair means to get the tract of the other; but neither has a right to *jostle* the other, to strike *his horse*, *to run on his heels*, *or anything of the kind*. If one horse gets the tract of the other, he is not obliged to leave it, to save the other's being polled, and if he is *jostled* or the like so as to lose the tract, the one that gave the *jostle* will be distanced, though he did it to save being polled himself. The opinion of the judges of the race is not conclusive. The matter may be afterwards examined by a jury upon testimony produced before them. His Honor here said that he remembered the case of one Pucket in Halifax Superior Court, ten or twelve years ago: where the judges of the race at the start differed in opinion, one saying that there was half a neck difference, and the other that they were even, and at the other end the judges agreed that there was half a neck difference, but they all agreed together that it should be a draw race. Pucket, however, who started the horse that came through first, recovered before a jury, by dividing the difference between the opinions of the two judges at the start, so as to win the race only by the distance of the quarter of the length of the horse's neck.

Ashe, J. Hyder got the tract, and the other left it. Here is the point, whether the tract was obtained fairly or not? Col. Brown says he thinks Hyder forced the Centinel out of the tract by his weight. If this was the case it was not fair, but whether agreeable to the rules of racing or not, I

cannot tell. It is true the plaintiff's witnesses are generally sportsmen, and of course their curiosity was engaged, and the probability is that they observed nicely but they only speak negatively, &c.

It was clearly held by both the Judges that an action well lay against the stakeholder, by the party that won the race; and none would lie against the losing party: because he had complied with that article of the agreement, which obliged him to pay, by staking his money with the defendant.

A verdict was found, under these charges, for the plaintiff.

ASHE, J., and WILLIAMS, J., present.

NOTE.—That the opinion of the judges of a horse race is not conclusive was also held in *Moore* v. *Simpson*, 1 Murph. Rep., 33. The act of 1810 (1 Rev. Stat., ch. 51) makes void all bets, contracts, &c., respecting horse racing; and it has been determined under that act, that if money, betted on a horse race, be deposited with a stakeholder, to be by him delivered to the winner, and the stakeholder pay over the money to the winner, after notice from the loser not to do so, the latter may recover the money from the stakeholder. *Wood* v. *Wood*, 3 Murph. Rep., 172. See also *Forest* v. *Hart*, Ibid, 458.

NEWBERN, *March Term*, 1793.

THE STATE v. ADAMS.—Page 30.

In an indictment for murder, the offence must be charged in the body of the bill, to have been committed within the district, over which the court has jurisdiction; it is not sufficient that the caption names the district; therefore, where the offence (in the district court) was laid to have been committed in Beaufort county, without adding in the district of Newbern, judgment was arrested.

The defendant had been convicted at the preceding term, of murder, upon the following indictment, to-wit:

"State of North Carolina, Newbern District. } March Term, 1792.

The Jurors for the State, upon their oath present, that David Adams, late of Beaufort county, planter, not having

the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the second day of October, in the year of our Lord, one thousand seven hundred and ninety-one, and in the sixteenth year of American Independence, with force and arms, in the county of Beaufort aforesaid, in and upon one Anthony Mills, in the peace of God and the State then and there being, feloniously, wilfully and of his malice aforethought, did make an assault, and that the said David Adams, with both his hands and feet, he the said Anthony Mills to and against the ground, then and there feloniously, wilfully, and of his malice aforethought, did cast, throw and pull down: and the same Anthony Mills so upon the ground lying, he the said David Adams, with both the hands and feet of him the said David Adams, the said Anthony Mills in and upon the head, breast, back, stomach and sides of the said Anthony Mills, then and there feloniously, wilfully, and of his malice aforethought, did strike, beat and kick: giving to the said Anthony Mills, as well by the casting, throwing and pulling down of him the said Anthony Mills, with both the hands and feet of him the said David Adams, in manner aforesaid, several mortal bruises, of which several mortal bruises the said Anthony Mills languished, from the said second day of October till the morning of the third day, being the day following, in the year aforesaid, in the county of Beaufort aforesaid; and languishing did live: on which said third day of October, in the said sixteenth year of American Independence as aforesaid, in the same year, being the day following, the said Anthony Mills in the said county of Beaufort, of the said several mortal bruises aforesaid, died; and so the Jurors aforesaid, upon their oath aforesaid, do say that the said David Adams, the said Anthony Mills, in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, against the peace and dignity of the State."

He was brought to the bar, and it being demanded of him whether he had anything to say, wherefore judgment of death should not be passed upon him, pursuant to the said conviction?

Davie moved in arrest of judgment for the following reasons, filed at the term the conviction was had, to-wit:

I. That the words *with force and arms* are omitted or left out in the said indictment, where those words are material and necessary.

II. That the *district* in which the murder should have been charged to have been done, is not mentioned or inserted.

III. That the said indictment is too vague and uncertain, for the Court to give judgment upon; for in charging the manner by which the said David Adams committed the murder aforesaid, it is set forth, *that as well by the casting, throwing and pulling down of him the said Anthony, &c.*, without any relative whatever; so that the said Anthony might have come by his death by other means in a manner different from that charged in the bill of indictment.

IV. That the indictment is otherwise informal, defective and insufficient.

Mr. Solicitor General *Jones*, for the State.

WILLIAMS, J. It is not to be doubted, but that by the common law, sufficient certainty must appear. The first reason is waived by reason of the statute of Henry the VIIIth. As to the second, the counsel for the prisoner says that the district is the true *venue* here. It is certainly true, and the niceties spoke of by justice Blackstone, as condemned by Hale, are not such as these; the proper *ville* is not mentioned. As to the knowledge that Beaufort county is in Newbern district, that don't appear from the indictment. If it had said the district aforesaid, it might do perhaps, but suppose there had been another county, in another State, of the same name, that would not be in the jurisdiction. This therefore is uncertain, and might be more certain. And as to the third objection, there seems to be some weight in it; but the second is so clear, that there is no doubt; and his Honor was therefore clearly of opinion that the indictment was insufficient.

Ashe, J. The niceties required in ancient times in law proceedings became a grievance and the statutes of *Jeofails* remedied the abuse in civil cases, but not in criminal. As to the first objection, the statute of Henry the VIII. does it away. As to the second, in making observations of this kind he should only go over those of Judge Williams. It is true the district is mentioned, not indeed in the margin, but in the caption ; it must certainly also be in the body of the indictment. There is no law or authority that excludes that idea, because it will then appear that the jury has come from the proper *venue.* It is contended that it is very well known that Beaufort county is in the district of Newbern ; but we are not to take our knowledge from anything but the record. If it had said district aforesaid, it would do, but there might be another county of that name, &c. And as to the third reason, here are two distinct charges in the indictment : it don't charge that he came to his death by both modes ; therefore there ought to be a relative. To make this proper, there ought to be a double relative, &c. He read the precedent in the Crown Circuit, and the indictment pursued it ; but his Honor observed notwithstanding that it certainly was improperly charged.

And, therefore, judgment was arrested. *Per totam Curiam.*

Hillsborough,—— *Term*, 179–.

STRUDWICK *v.* SHAW.—Page 34.

The land in dispute was granted to A. in 1728, who sold to B. in 1730, and B. sometime afterwards went to England. B. sold to C. who came to Carolina, where he remained till 1787, when he brought suit. One D. settled on the land in 1751, lived upon it thirteen years, and died in possession, leaving a son. The son assigned to some person, who assigned to the defendant, who had lately procured a grant. Under these circumstances *it was held* that the plaintiff's *jus possessionis* was lost.

Note.—See this case reported in 1 Hay. Rep., 5, and, in addition to the authorities referred to in the note, see *Blair* v. *Miller*, 2 Dev. Rep., 407. *Green*

v. *Harman*, 4 Dev. Rep., 158. *Burton* v. *Carruth*, 1 Dev. & Bat., 2. *Carson* v. *Burnett*, Ibid., 546. *Pickett* v. *Pickett*, 3 Dev., 6. *Hoke* v. *Henderson*, Ibid., 12. *Rogers* v. *Mabe*, 4 Dev., 180. *Dobson* v. *Murphy*, 1 Dev. & Bat., 586. *Dobson* v. *Erwin*, 4 Dev. & Bat., 201., *Murray* v. *Shanklin*, Ibid., 289. *Ross* v. *Durham*, Ibid., 54. *Tredwell* v. *Reddick*, 1 Iredell's Rep., 56. *Flanniken* v. *Lee*, Ibid., 293. *Williams* v *Buchanan*, Ibid., 535.

In Equity, Halifax, *April Term*, 1796.

JONE'S EX'RS v. STOKES.—Page 36.

The defendant pleaded in this case that the process, &c., had not been served on him *ten days* before Court, as the Act of Assembly directs; but it appearing that it had never been served upon him at any time: 1782, 11, 432.

The Court, Haywood, J., and Stone, J., ordered the plea to be overruled: because the act only gives the advantage to the defendant for an *illegal* service, but not when there is *no* service at all.

Note.—See an anonymous case in 1 Hay. Rep., 286, which is probably the same case with this, and *Worthington* v. *Colhane*, 2 Car. Law Repos., 68, which fully sustains it.

Newbern, *September Term*, 1796.

BETTNER v. ———.—Page 36.

In an action on a foreign bill of exchange protested for non-acceptance, the defendant, by suffering a default, admits the declaration to the amount of the bill, but the plaintiff to entitle himself to extraordinary interest and damages under the act of 1741, (sec 1 Rev. Stat., ch. 13, sec. 8,) must prove notice to the defendant of the dishonor of the bill.

Case on a foreign bill of exchange, protested for non-acceptance. The defendant suffered a default: on executing the writ of enquiry, a question arose, whether the plaintiff was bound to give notice to the defendant, that his bill had been dishonored before he could bring suit?

and by the Court, the defendant, by suffering a default, has admitted the declaration to the amount of the bill.

Whereupon it was urged in behalf of the plaintiff, that he should recover 15 per cent. damages for costs of protest, &c., and 10 per cent. annual interest, until the time of recovery. 1741, 16, 79.

But after great deliberation, the Court was of opinion that the plaintiff ought to prove notice to entitle himself to extraordinary interest and damages, and having failed so to do, was only entitled to 6 per cent., and the jury found a verdict accordingly.

Graham, for the plaintiff.
Taylor, for the defendant.

M'Coy, J., and Stone, J., present.

Newbern, *March Term*, 1794.

KAIGHN & ATTMORE v. KENNEDY.—Page 37.

It is the practice to admit depositions which come up with the transcript of the record from the County to the Superior Court, to be read, and to presume that notice has been duly served, and the depositions duly taken, upon proof that they were read below.

Declarations of the counsel of the adverse party cannot be given in evidence.

After a jury is empannelled in the Superior Court, if it appear that one of the jury has tried the cause in the County Court, the juror will be withdrawn, and the cause continued, though one of the parties insists on having another juror sworn.

In an action for goods sold and delivered, interest should be allowed according to the custom of the place where the goods were sold.

Certiorari. At the trial *Davie*, for the plaintiffs, offered to read a deposition taken in Philadelphia.

Moore, for the defendant, objected, unless notice could be proved to have been given to the defendant, of the time and place at which the deposition was taken.

Ashe, J., inclined to think the deposition ought not to be read, unless notice was proved. But

M'Coy, J., said, it had been the constant practice of the Superior Courts, when a cause from the County Courts was tried anew, and a deposition come up with the transcript of the record, to admit it to be read; and to presume due service of the notice and that the deposition had been duly taken, on proof that it had been read below.

Whereupon, by the Court. Let proof be made of the reading of this deposition below, and it may be read.

Davie offered to read a certificate, which the plaintiff had obtained from the District Judge of the United States, *Sitgreaves*, who, while at the bar, was of counsel for the defendant in this case; stating that the deposition was taken by consent of him and *Caswell*, counsel for the plaintiffs, and that notice was waived.

But *Moore* and *Martin* opposed that evidence, as it was not given on oath.

Davie contended that evidence might be given of an adverse party's declaration—that *Sitgreaves* being the defendant's counsel, his declaration might be given in evidence, with as much propriety as that of the principal. That if it may, evidence of it in writing ought to be received.

But the Court, Ashe, J., and M'Coy, J., unanimously rejected it.

While the plaintiffs' counsel was looking round to discover some person, who could prove what was required of him, one of the jurors looking at the deposition recognized on the back of it, some figures which he had made in casting up the interest, at the trial in the County Court; having been a juror there.

Moore objected then, to that gentleman trying the cause now; as he had already done so once.

On this, the cause was continued ; although *Davie* insisted, very strenuously, that another juror might be sworn.

At September Term following, the plaintiffs had a verdict : but

Martin, for the defendant, moved for a rule to shew cause why a new trial should not be had. Urging 1st, that, improper evidence had been suffered to go to the jury ; 2d, that excessive damages had been given.

The rule was granted ;

And on the last day of the term, *Graham*, for the plaintiffs, moved to have the rule discharged ; on the ground that the defendant, on the argument day, ought to have moved for the rule being made either absolute or enlarged : that having neglected to do so, he ought to be considered as having abandoned his motion.

But *Martin* and *Badger* contended that this being the last day of the term, no business on the law docket could be taken up ; the law having exclusively set apart the three last days of every term, for the dispatch of equity business. 1792, 8, 46.

Graham replied that the rule must be looked upon as having expired : and

Martin and *Badger* held that the defendant, having obtained the rule and served a copy of it, nothing remained to be done by him, until the plaintiffs shewed cause.

That it was the plaintiffs', and not the defendant's duty to move the court : and cited a number of cases out of *Burrows*.

Of this opinion was the Court, [M'Coy, J., *alone*,] who said, that although it was certainly the duty of the plaintiffs to have applied sooner, and on their having neglected to do so, the rule might be made absolute : yet as this cause had

long been depending, (it having been commenced nine years ago,) he would enlarge the rule until next term.

At March term, 1795. The rule for a new trial was taken up; and the reasons assigned by *Martin* were:

1. That the declaration contained but the two common counts, for goods, &c., sold and delivered at a stated price, and on a *quantum valebant:* yet an agreement signed by the defendant, that interest should be paid after six months from the delivery of the goods, was read to the jury, from the deposition taken in Philadelphia; although that agreement was not declared upon—and it was therefore improperly introduced.

2. That excessive damages had been given: interest having been computed from the delivery of the goods.

The Court, ASHE, J., and WILLIAMS, J., thought that interest being customarily allowed in Philadelphia in similar cases, it was proper that it should be given in this; even if there had been no agreement to that effect.

They deemed the second objection a proper one.

The plaintiff remitted the interest, during the first six months; and had judgment.

NOTE.—Upon the first point see *Rutherford* v. *Nelson*, 1 Hay. Rep., 105, and *Collier* v. *Jeffries*, 2 Hay. Rep., 400. Upon the 4th point see *Anonymous*, 2 Hay. Rep., 5.

NEWBERN, *September Term*, 1796.

GREGORY *v.* BRAY.—Page 39.

Under the act of 1777, (Rev., ch. 115, sec. 77,) directing the time within which the transcript shall be filed in the Superior Court, in appeals from the County Court, if the appellant fail to file the transcript until after the time prescribed, the Court has no discretion to permit the cause to be placed on the trial docket, but the judgment must be affirmed.

Appeal. The transcript of the record was carried up

thirteen days before the Superior Court, 2, 1777, 2, 84, 314.

The judgment was affirmed, on the second day of the term; unless cause be shewn to the contrary, on the argument day.

On which day the defendant's affidavit was read, stating that the judgment had been obtained at the last session of Jones County Court—that there were but thirty-three days between the last day of that session and the first of this term—that the defendant was sick a bed on the day on which the transcript was to be carried up—that he came down in a boat, being unable to ride—that he arrived time enough to file the transcript; but discovered on his landing that his pocket book which contained it, had been accidentally left behind—that he returned immediately home and came back on the next day with the transcript, but was informed it could not be received, it being then *one* day too late—that he came back on the next day to advise with counsel and was directed to file the transcript, which he did. Whereupon he prayed that the cause might be placed on the trial docket.

Stone, J. If the Court had any discretion to exercise, this would be a proper case to use it; but the act is positive.

M'Coy, J. The act of Assembly leaves the party in this case without a remedy. It is not within the power of the Court to create one for him. It has often been adjudged so.

The judgment was affirmed absolutely.

Harris and *Badger*, for the plaintiff.
Martin, for the defendant.

Note—See *Robertson* v. *Stone*, 1 Hay. Rep., 401. *Hood* v. *Orr*, N. C. Term Rep., 151. The law regulating the mode in which appeals shall be carried up from the County to the Superior Court has been altered by the acts of 1816, ch. 903, sec. 3, and 1821, ch 1117, sec. 1 & 5, (1 Rev. Stat., ch. 4, sec. 3, 4 & 5.

NEWBERN, *March Term*, 1794.

THE STATE v. GEORGE, a free negro.—Page 40.

Mr. Solicitor General Jones had drawn a bill of indictment for burglary against the defendant: and at the moment it was about to be sent to the grand jury, and the book was handed to the witnesses:

Martin called the attention of the Court to the table: observing that one of the witnesses about to be sworn, was a negro slave; that although the defendant was a negro, yet, he being a freeman, it was perhaps improper that a slave should testify against him.

M'COY, J. [ASHE, J., *tacente*]. If there be anything in the objection, the Court will attend to it at the trial.

The slave was sworn, and the bill was found. The prisoner being arraigned, pleaded not guilty; but made his escape before the day assigned for his trial.

See *Cox* v. *Dove*, post, 43.

NEWBERN, *September Term*, 1796.

SHEPPARD v. SALTER.—Page 40.

A new trial granted on payment of full costs, after a nonsuit voluntarily suffered, an affidavit that a witness, by whom the plaintiff expected to repel the plea of the statute of limitations, had voluntarily withdrawn himself just before the trial.

Case *sur assumpsit*. The plaintiff went to trial; proved his debt but could not give evidence to repel the plea of the statute of limitations; and suffered a nonsuit.

He afterwards offered an affidavit that one of his witnesses, by whose testimony he would have been able to prove a re-assumption within three years, was at his coun-

sel's elbow a little before the cause came on, but was out of the Court House at the time he was called. Whereupon he prayed that the nonsuit be set aside.

The Court said he ought to have prayed a continuance.

But on his observing that he had thought that by going to trial and satisfying the court, by the testimony of a witness who attended, that he had a good cause of action, and that he failed only on the proof of a re-assumption : the justice of the case being on his side, he would appear entitled to the favour he prayed.

STONE, J. Let the nonsuit be set aside, on payment of full costs.

M'COY, J., *tacente.*

Davie, for the plaintiff.
Arnett, for the defendant.

NOTE.—See *Williams* v. *Harper*, 2 Car. Law Repos., 401. *Reynolds* v. *Boyd*, 1 Iredell's Rep., 106.

NEWBERN, *September Term*, 1795.

ELLIS'S ADM'R v. HETFIELD.—Page 41.

In covenant by an administrator, and *non est factum* pleaded, the handwriting of the plaintiff, who was the only subscribing witness, was permitted to be proved, but the court also required proof of the signature of the defendant.

Covenant and *non est factum* pleaded. *Martin*, for the plaintiff, offered to give evidence of the handwriting of the plaintiff, who was the only subscribing witness to the specialty ; and cited *Godfrey* v. *Norris*, 1 Strange, 34.

This was objected to by *Slade*, for the defendant : but Admitted by the Court, WILLIAMS, J., and HAYWOOD, J.,

And, proof having given of the subscribing witness's handwriting:

WILLIAMS, J., required that the signature of the defendant should also be proved.

HAYWOOD, J., *tacente.*

It was accordingly done, and the plaintiff had a verdict.

NOTE.—See the note to *Hamilton* v. *Williams*, 1 Hay. Rep., 139, and the cases there referred to, and also the case of *Saunders* v. *Ferrill*, 1 Iredell's Rep., 97.

NEWBERN, *March Term*, 1795.

HARVEY v. JONES & BARFIELD.—Page 41.

Where a subscribing witness resides in the State, but is temporarily absent at the trial, whether proof of his handwriting should be admitted, qu?

Case on a promissory note. The plaintiff proved that the subscribing witness was not in the State, and offered to give evidence as to his handwriting.

But it appearing that the witness resided in the State, and was occassionally absent:

The Court, ASHE, J., and WILLIAMS, J., doubted of the propriety of admitting proof of the handwriting: saying that the testimony of that witness might be obtained at another term—that a commssion might be taken and his deposition procured while he was in the State, and read, if he happened to be abroad at the time of trial.

They recommended it to the counsel of both parties to consent to a juror being drawn.

And on their agreeing thereto, it was accordingly done.

Martin, for the plaintiff.

Badger, for the defendants.

NOTE.—See *Gordon* v. *Payne*, post 72. *Selby* v. *Clark*, 4 Hawks, 265, from which it appears that such testimony is inadmissible.

NEWBERN, *September Term*, 1796.

BORDEN v. NASH'S ADM'R.—Page 42.

Where an administrator omits to plead *plene administravit*, and there is judgment against him, on *nulla bona* being returned to an execution *de bonis testatoris*, the plaintiff may take out his execution *de bonis propriis*, without waiting for the return of a *devastavit*.

The defendant omitted to plead *plene administravit*, and judgment being obtained, the plaintiff took out an execution *de bonis testatoris*. On *nulla bona* being returned, he took out an execution *de bonis propriis*.

The defendant prayed and obtained a writ of *supersedeas quia erronice emanavit* to the last execution. And

At this term *Slade* and *Graham*, for the plaintiff, moved to have the *supersedeas* set aside.

Martin, for the defendant, contended that the execution had irregularly issued *de bonis propriis*, before a *devastavit* had been returned—and cited 1 Morgan's Vade Mecum, 210, 211.

STONE, J. The practice is generally so laid down in the books, and the authorities are all that way; but the Courts in this country have taken a shorter road—and whenever the defendant does not plead *plene administravit*, they have always permitted the plaintiff on *nulla bona* being returned on the execution *de bonis testatoris*, to levy the debt *de bonis propriis*, without waiting for the return of a *devastavit*.

M'COY, J., concurring:

The *supersedeas* was set aside.

NOTE.—See *Parker* v. *Stephens*, 1 Hay. Rep., 218, and cases cited in the note thereto.

NEWBERN, *September Term*, 1796.

DANIEL v. COBB'S EX'R.—Page 42.

Scire facias to receive an action of detinue: *Davie*, for the defendant, pleaded in abatement, that this action could not be revived against representatives.

But the Court, McCOY, J., and STONE, J., overruled the plea: they said it had been often adjudged that this action could be revived.

A case was cited in which the same principle was held, respecting the action of *trover*, at Wilmington Superior Court.

Harris, for the plaintiff.
Davie, for the defendant.

NOTE.—See S. C. post, 77.

NEWBERN, *March Term*, 1796.

COX v. DOVE, A Free Negro.—Page 43.

A slave cannot be a witness against a free negro.

In trespass *quare clausum fregit*, the defendant under the general issue may give in evidence a license.

Trespass *quare clausum fregit* and *non culpabilis* pleaded.

To prove the entry a negro slave was called and offered to be sworn.

But the Court [WILLIAMS, J., saying he never heard such a thing asked: HAYWOOD, J., *tacente*,] refused to admit the witness, although the defendant was stated to be a negro. 2, 1777, 2, 42, 307.

The case of *The State* v. *George*, ante, p. 40, was cited: but much argument was not offered by the plaintiff's counsel; there being other witnesses, attending to prove the fact intended to have been proved by the slave. He having been offered only to come at the opinion of the judges.

Slade, for the defendant, offered to read in evidence, a letter from the plaintiff to the defendant, authorizing him to tend turpentine trees on the premises.

Martin, for the plaintiff, objected to this: on the ground that if the defendant meant to avail himself of the plaintiff's license, he ought not to have denied the entry, which he had done by pleading *non culpabilis;* at all events he ought to have pleaded *justification.* He cited Co. Litt., 282.

The Court, HAYWOOD, J., and STONE, J., nevertheless permitted the letter to be read: on the authority of a case cited out of Buller's Nisi Prius, 90. Hatton & Neale, per Jones, C. J., 1683.

The plaintiff proved a trespass committed by cutting timber, and had a verdict.

NOTE.—Upon the 1st point see *State* v. *George*, *ante*, 40, and 1 Rev. Stat., ch. 31, sec. 81. It is believed that the law is now clearly settled that a slave is a competent witness against a free negro.

NEWBERN, *September Term*, 1794.

STATE v. GROVE.—Page 43.

An examination of a prisoner made before a magistrate, must be recorded within two days under the acts of 1715, (1 Rev. Stat., ch, 35, sec. 1,) and 2 & 3 Phil. & Mary, ch. 10; and parol evidence of it cannot be received.

Where there are two statutes *in pari materia* as the Stat. 2 and 3, P. & Mary, ch. 10—and the act of 1715, (Rev. Code, ch. 1,) and the latter contains no words of repeal, they are to be taken as one law.

Indictment for arson. Mr. Solicitor General *Jones*, praying that a witness might be sworn.

Davie, who was of counsel for the prisoner, asked what use was expected to be made of his testimony? whereupon the Solicitor General informed the Court that the gentleman at the table was the magistrate who had committed the prisoner: and he was introduced to give evidence of the prisoner's confession or admission, previous to his commitment.

The magistrate was asked whether he had committed the examination of the prisoner to writing, and answered in the negative.

Davie for the prisoner. *Parol* evidence of the prisoner's examination is inadmissible. It is required by 1715, 16, 11, that the examination of the party be *recorded*.

Of which opinion was the COURT.

Whereupon Mr. Solicitor General wished the magistrate to sit down at the table and make a record of the examination, that it might be read—but

Davie held it was now too late. The examination ought to be committed to writing within *two days*, after the taking of it. It is so required by 2 & 3 P. & M., 10, 284.

Mr. Solicitor General. The statute is not *now* in force; the Act of Assembly, already quoted, has repealed it.

The Court, M'COY, J., *alone*. There being no words of repeal in the act, and the statute being *in pari materia*, they ought to be taken as one law.

The magistrate not being admitted to be sworn,

Mr. Solicitor General entered a *nol. pros.* and the prisoner was discharged.

NOTE.—Upon the 1st point see 1 Rev. Stat., ch. 35, sec. 1—and the case of the *State* v. *Irwin*, 1 Hay. Rep., 112, and the note thereto.

On the 2nd point see *Ogden* v. *Witherspoon*, 2 Hay. Rep., 227.

NEWBERN, *September Term*, 1794.

THOMEGUEX v. BELL.—Page 44.

Defendants, though not named in the book debt law of 1756, (Rev. Co., ch. 57,) have always been admitted to its benefit, and, therefore, may prove a set-off under it.

The defendant offered to prove a set-off, under the book debt act. 1756, 4, 171.

The plaintiff's counsel opposed it, on the ground that this act being in direct contradiction of one of the most wholesome maxims of the common law, ought to be strictly construed. That *plaintiffs* alone were mentioned in it: and it ought not to be extended to *defendants* by implication.

He cited a saying of Lord Coke, in *Slade's* case, 4 Rep., 95. *Jurare in propria causa est sæpenumero hoc seculo, precipitium diaboli, ad detrudendas miserorum animas ad infernum.*

By the Court, M'COY, J., *alone*. *Defendants* have been uniformly admitted to the benefit of this act. The objection has never been made before: the practice of the Court has been the other way. Let the defendant be sworn.

He proved his set-off, which consisted of a tavern bill, partly by the testimony of a witness, and partly, a sum under £30, by his own oath.

To the set-off there was a replication of the act respecting ordinaries, 3, 179, 10, 10, 392: which was insisted on by the plaintiff.

The Court, M'COY, J., *alone*, in the charge, told the jury it was doubtful whether the act contemplated a case like this, viz: that of a person *constantly* residing in a town, and *occasionally* calling at a tavern. His Honor said, the act was perhaps intended only to operate in case of seafaring men, and *transient* persons. The jury would do well to consider of this.

They allowed the set-off.

Martin, for the plaintiff.
Slade, for the defendant.

*** At the succeeding term, the first question was incidentally mentioned from the bench, in another cause.

ASHE, J., inclined to think the book debt act did not admit of so liberal a construction, as to admit *defendants* to the benefit of it.

WILLIAMS, J., seemed clearly of the contrary opinion.

See 1 Rev. Stat., ch. 15, sec. 6.

NEWBERN, *September Term*, 1796.

EAVES & EAVES v. EX'R OF STARKEY, EX'R OF EAVES.—Page 45.

An action of account will not lie against an executor as the bailiff or receiver of a legatee.

Account. The jury found the following special verdict, viz.:

"That Edward Starkey was executor of Edward Starkey, who was executor of Richard Eaves. That Edward Starkey, the first testator, came to the possession of sundry negroes as executor of Richard Eaves, hired them out, and received the hire."

"That the defendant is the receiver of the plaintiff."

"Subject to the opinion of the court, on the following questions:"

"1. Whether an action of account lies against the executor of an executor?"

"2. Whether it can be sustained to charge an executor as bailiff, or receiver of legatees?"

The Court, WILLIAMS, J., and HAYWOOD, J., gave judgment for the defendant, on the *second* question.

They gave no opinion on the first question—it being unnecessary in this case. See 4. Ann, 16, 37, 394.

Slade, for the plaintiff.
Graham, for the defendant.

NOTE.—See *Anonymous*, 1 Hay. Rep., 226.

NEWBERN, *March Term*, 1796.

GOODRIGHT ON THE DEM. OF SHEPPARD v. TAYLOR.—Page 46.

On a question for the opinion of the court, respecting the taxation of costs, it was determined,

By the Court, HAYWOOD, J., and STONE, J., That the surveyors are entitled to receive 20s. per day, while on the premises, making the plots, &c., but while attending the court, where their attendance is necessary, the common allowance of witnesses.

The special jurors are to be allowed, while on the premises, 8s. per day: and while at court, in the Superior Court, the same allowance. But, in the County Court, nothing. 1786, 13, 583.

NOTE.—See 1 Rev. Stat., ch. 31, sec. 124, and ch. 105, sec. 32.

NEWBERN, *September Term*, 1792.

DALZELL'S ADM'R v. STANLY'S EX'R.—Page 46.

A plea in abatement should be filed at the first term, and is waived by a plea in chief.

After a plea in chief, the court will not dismiss a suit for want of a declaration under the act of 1786, (1 Rev. Stat., ch. 31, sec. 62,) the motion being in the nature of a plea in abatement.

This was an action upon the case, on a promisary note of the testator.

At the appearance term, *Moore*, who had been for many years employed by *Stanly* in all his suits, and also, after his death by the executor, entered his appearance, and pleaded the general issue, although no declaration had been filed.

At the March Term last, Turner, the executor, came into Court, in person, with an affidavit stating that no declaration had been filed, and moved to have the suit dismissed, according to the act of Assembly. 1786, 14, 5, 585.

M'Coy, J., who was alone on the bench, refused to determine the motion, on account of its being a point of *argument*, which requires the presence of *two* Judges. 2, 1777, 2, 2, 297.

His Honor directed the affidavit to be filed, and the motion to stand over for argument at the next term.

And now, at this term, *Wood*, for the defendant, argued that the cause ought to be dismissed for want of a declaration: notwithstanding the plea in chief: which, there being no declaration for it to answer, must be considered as a nullity. But

It was answered by *Davie*, and

Resolved by the Court, Williams, J., and M'Coy, J., that the motion is in the nature of a plea in abatement, and cannot be more favored:

That if this were a plea in abatement, it must not only have been put in at the first term, if at all; but it would be waived by the plea in chief.

That as it is a summary motion, it is entitled to no better treatment.

It was said to have been so resolved by the Judges in some other cause.

*** There was another suit between those parties, where the same motion was also made, and in which it had the like fate.

Note.—See *Anderson* v. *Anderson*, ante, 19, and 1 Rev. Stat., ch. 31, sec 62.

STATE v. SHEPPARD.—Page 47.

In an indictment for an assault and battery, the court will not continue a cause for the absence of a witness who can prove great provocation only, on the part of the prosecutor, but after verdict will suspend the judgment.

Indictment for an assault and battery. At the trial the defendant prayed a continuance, on account of the absence of a material witness.

He was asked what that witness would prove? and on his answering that he intended to prove by the testimony of that witness that the prosecutor had given him very great provocation.

By the Court, ASHE, J., and WILLIAMS, J., this will only go in mitigation of the fine. Let the cause be tried, and if there be a verdict against you, we will postpone giving judgment until next term; in order that you may have the benefit of the testimony of your witness.

The cause was tried, and there being a verdict against the defendant, he was bound over to the next Court.

Ex relatione Arnett.

NEWBERN, *November Term*, 1787.

DEN ON THE DEM. OF BAYARD and wife v. SINGLETON.—Page 48.

By the constitution every citizen has a right to a decision in regard to his property by a trial by jury. The act of Assembly therefore of 1785, requiring the Court to dismiss on motion, the suits brought by persons, whose property had been confiscated, against the purchasers, on affidavit of the defendants that they were purchasers from the commissioners of confiscated property, is unconstitutional and void.

Aliens cannot hold land, and if they purchase, the land is forfeited to the sovereign.

An act of Assembly passed during a war and confiscating the property of an alien enemy *by name*, is at least as effectual in vesting the property in the State, as any *office found* according to the practice in England.

Ejectment. This action was brought for the recovery of

a valuable house and lot, with a wharf and other appurtenances, situate in the town of Newbern.

The defendant pleaded *not guilty*, under the common rule.

He held under a title derived from the State, by a deed, from a Superintendent Commissioner of confiscated estates.

At May Term, 1786, *Nash* for the defendant, moved that the suit be dismissed, according to an act of the last session, entitled an act to secure and quiet in their possession all such persons, their heirs and assigns, who have purchased or may hereafter purchase lands and tenements, goods and chattels, which have been sold or may hereafter be sold by commissioners of forfeited estates, legally appointed for that purpose, 1785, 7, 553.

The act requires the Courts, in all cases where the defendant makes affidavit that he holds the disputed property under a sale from a commissioner of forfeited estates, to dismiss the suit on motion.

The defendant had filed an affidavit, setting forth that the property in dispute had been confiscated and sold by the Commissioner of the district.

This brought on long arguments from the counsel on each side, on constitutional points.

The Court made a few observations on our constitution and system of government.

Ashe, J., observed, that at the time of our separation from Great Britain, we were thrown into a similar situation with a set of people ship-wrecked and cast on a maroon'd island—without laws, without magistrates, without government, or any legal authority—that being thus circumstanced, the people of this country, with a general union of sentiment, by their delegates, met in Congress, and formed that system or those fundamental principles comprised in the constitution, dividing the powers of government into separate and distinct branches, to-wit: the legislative, the judicial and executive, and assigning to each, several and distinct powers, and prescribing their several limits and boundaries: this he said without disclosing a single sentiment

upon the cause of the proceeding, or the law introduced in support of it.

CURIA ADVISARE VULT.

At May term, 1787, Nash's motion was resumed, and produced a very lengthy debate from the bar.

Whereupon the Court recommended to the parties to consent to a fair decision of the property in question, by a jury according to the common law of the land, and pointed out to the defendant, the uncertainty, that would always attend his title, if this cause should be dismissed without a trial; as upon a repeal of the present act, (which would probably happen sooner or later) suit might be again commenced against him for the same property, at the time when evidences, which at present were easy to be had, might be wanting. But this recommendation was without effect.

Another mode was proposed for putting the matter in controversy on a more constitutional footing for a decision, than that of the motion under the aforesaid act. The Court then, after every reasonable endeavor had been used in vain for avoiding a disagreeable difference between the Legislature and the Judicial powers of the State, at length with much apparent reluctance, but with great deliberation and firmness, gave their opinion separately, but unanimously for overruling the aforementioned motion for the dismission of the said suits.

In the course of which the Judges observed, that the obligation of their oaths, and the duty of their office required them in that situation, to give their opinion on that important and momentous subject; and that notwithstanding the great reluctance they might feel against involving themselves in a dispute with the Legislature of the State, yet no object of concern or respect could come in competition or authorize them to dispense with the duty they owed the public, in consequence of the trust they were invested with under the solemnity of their oaths.

That they therefore were bound to declare that they considered, that whatever disabilities the persons under whom the plaintiffs were said to derive their titles, might justly

have incurred, against their maintaining or prosecuting any suits in the Courts of this State; yet that such disabilities in their nature were merely personal, and not by any means capable of being transferred to the present plaintiffs, either by descent or purchase; and that these plaintiffs being citizens of one of the United States, or citizens of this State, by the confederation of all the States; which is to be taken as a part of the law of the land, unrepealable by any act of the General Assembly.

That by the constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury. For that if the Legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without a trial by jury, and that he should stand condemned to die, without the formality of any trial at all: that if the members of the General Assembly could do this, they might with equal authority, not only render themselves the Legislators of the State for life, without any further election of the people, from thence transmit the dignity and authority of legislation down to their heirs male forever.

But that it was clear, that no act they could pass, could by any means repeal or alter the constitution, because if they could do this, they would at the same instant of time, destroy their own existence as a Legislature, and dissolve the government thereby established. Consequently the constitution (which the judicial power was bound to take notice of as much as of any other law whatever,) standing in full force as the fundamental law of the land, notwithstanding the act on which the present motion was grounded, the same act must of course, in that instance, stand as abrogated and without any effect.

Nash's motion was overruled.

And at this term the cause was tried.

Both the plaintiffs and the defendant admitted the title of the premises to have been in Samuel Cornell, Esq., at and before the time when the independence of this State commenced.

The case appeared to be this: Mr. Cornell, once an inhabitant of Newbern, leaving his family, together with the premises in question, and a variety of property in this town, took shipping on the 19th of August, 1775, and went to Great Britain, where he continued till some time in the latter part of the year 1777, when he came to New York, then occupied by a British garrison; and as a British subject came from thence and arrived in Newbern, on the 11th of December, 1777, and under the protection of a British flag.

His principal design, in coming to this State at that time, was to take his wife and family with him, to reside under the British Government, if he did not find our new government agreeable to his wishes. Not being pleased with the appearance of things here, and thereupon preparing to leave the State, and to carry with him his wife and family, he executed on board the vessel he came in, a deed to his daughter, one of the plaintiffs (under which they claim) for the premises in question, on the 19th of December, 1777.

This deed for the purpose of execution had been handed to him without a date, and being asked what date he chose it should bear, he hesitated and said he would look at the copy of a bill which was then in his possession, which bill he understood to be on its passage in the legislature, for confiscating the property of all persons of his description, who should not within a limited time come into this State, and be made citizens thereof, which bill afterwards in the same session passed into a law. After looking at the aforesaid copy of that bill, he chose that the deed should bear date on the 11th of the same month, being the day he arrived in the harbour of Newbern; which deed was accordingly dated that day. After which Mr. Cornell returned with his family from this State, and from thenceforth lived and died a British subject, under the British Government.

The Court, Ashe, J., Spencer, J., and Williams, J., gave their opinion *seriatim*, but unanimously.

They observed that the cause turned chiefly on the point of *alienage* in Mr. Cornell. For this gentleman, having from his birth to the time of his death, been always a British

subject, and having always lived under the British government, he owed allegiance to the King of Great Britain, and consequently was never a citizen of this, or any other of the United States, nor owed allegiance thereto. For when here, at the time of the transaction aforementioned, he was under the protection of a British flag. That he was therefore, in contemplation of law, as much an *alien*, and at the time of executing the deed, and, from the time of our independence as much an *alien* ENEMY, as if we had been a separate and independent nation, for any number of years or ages before the commencement of the war which was then carried on.

That it is the policy of all Nations and States, that the lands within their government should not be held by foreigners. And therefore it is a general maxim, that the allegiance of a person who holds land ought to be as permanent to the government who holds it, as the tenure of the soil itself.—That therefore by the civil, as well as by the common law of England, *aliens* are incapacitated to hold lands. For that purpose the civil law has made the contracts with *aliens* void. The law of England, which we have adopted, allows them to purchase, but subjects them to forfeiture immediately; and does not allow an *alien* ENEMY any political rights at all.

That the premises in question, upon these invariable principles of law, could not from the time our government commenced, have been held by Mr. Cornell; because that in consequence of his owing no allegiance to the State, he had no capacity to hold them, and according to the letter of the law of the land, they must have consequently been forfeited to the sovereignty of the State. That the act of confiscation, in which Mr. Cornell was expressly named, and more particularly the act which especially directed the sale of the very premises in question, must have been at least as effectual in vesting them in the State, as any *office found*, according to the practice in England can be, for vesting any forfeited property in the King.

That the circumstances and limited privileges of persons who were sent out of this State under a particular act of our General Assembly, are not applicable to this case.

That the case in Vattel, of the majority of the inhabitants of any country deliberately dissolving their old government, and setting up a new one, is neither in reason, nor in the most essential circumstances, anyways similar to this case. That *Calvin's* case, reported in Coke, does by no means reach the leading and characteristic circumstances of this case.

The jury found a verdict for the defendant.

Iredell, *Johnston* and *Davie*, for the plaintiffs.

Moore and *Nash*, for the defendant.

*** On the decision of this cause, twenty-seven others depending in the same Court, and subsisting upon similar, or less substantial grounds, were all swept off the docket, by nonsuits voluntarily suffered.

Ex relatione SPENCER, J.

NOTE—As to an alien holding land in this State, see *University* v. *Miller*, 3 Dev. Rep., 188. On the last point see *Farris* v. *Simpson*, Conf. Rep., 178.

NEWBERN, *September Term*, 1795.

WILLIS v. BROWN'S EXECUTORS.—Page 52.

Davie, for the plaintiff, moved that a commission *de bene-esse* might be read upon the plaintiff's affidavit, that the deponent was sick and unable to attend.

The defendant objected to this: and

By the Court, WILLIAMS, J., and HAYWOOD, J. A party cannot entitle himself, by his own affidavit, to introduce this weaker kind of evidence. The disability of the deponent to attend the Court must be proved by indifferent testimony.

And the deposition was set aside.

NOTICE.—See —— v. *Brown's Ex'rs.*, 1 Hay. Rep., 227, (which is probably the same case with this,) and *Anonymous*, 2 Hay. Rep., 74.

NEWBERN, *September Term*, 1795.

MOORING v. STANTON.—Page 52.

Case on a promissory note, the consideration of which appeared to be money paid by the plaintiff to a third person, for money lost at gaming by the defendant.

On a plea of the statute of gaming. 1788, 5, 633.

HAYWOOD, J. Money lent to play with, or to pay, at the time of loss, is not recoverable. But it is otherwise of a gaming debt paid by a third person, at the request of the loser.

NOTE.—See act of 1788 (1 Rev. Stat., ch. 51,) and the cases upon the construction of it, *Anonymous*, 2 Hay. Rep., 231. *Stowell* v. *Guthrie*, Ibid., 297. *Hodges* v. *Pitman*, 2 Car. Law Repos., 394. *Turner* v. *Peacock*, 2 Dev. Rep., 303. *Hudspeth* v. *Wilson*, Ibid., 372. *Dunn* v. *Holloway*, 1 Dev. Eq. Rep., 322.

NEWBERN, *November Term*, 1780.

GORHAM and Wife v. ———.—Page 52.

Where a testator bequeathed as follows: "I give and bequeath all the rest of my negroes and their increase to be equally divided among my children, the survivor or survivors of them, and their heirs forever," and died, leaving a wife and three children, two of whom died infants, *it was held* that on the death of the first child, the mother was entitled to an equal share of its part of the said legacy with the two surviving children, and on the death of the second, she was entitled to share its estate with the survivor.

Petition. The following case was reserved for the opinion of the Court, viz:

"John Speir of Pitt county, in his last will and testament, among other things, bequeathed as follows, to-wit:

Item, I give and bequeath all the rest of my negroes and

their increase, to be equally divided among my children, the survivor or survivors of them, and their heirs forever.

The testator died, leaving his wife and three children, two of the children, viz.: William and Elizabeth, died infants and under age.

The question is, whether the mother (*Penelope*, now wife of *James Gorham*,) upon the death of the said two children, was entitled to any, and if any, what part of the said children's share of the legacy abovementioned?

We agree to submit the above question to the decision of the Court, and that they may thereupon make such decree upon the above petition, as to them shall seem just.

JAMES IREDELL, for the plaintiff.
WILLIAM HOOPER, for the defendant.

Newbern, November 22, 1780."

Whereupon the Court, Ashe, J., Spencer, J., and Williams, J., did determine, that upon the death of the first child, the mother was entitled to an equal share of the said estate of such child, with the two surviving children: and that upon the death of the other child who is deceased, she was entitled to an equal share of said estate of such deceased child, with the surviving one; and that a division of said estate be made accordingly.

November Term, 1778.

THE STATE v. SMITH.—Page 53.

A person convicted of manslaughter may be bailed, when the execution of the sentence is suspended.

The defendant, at November Term, 1778, was indicted for murder: He pleaded not guilty, and the jury found him guilty of *manslaughter*.

On being asked what he had to say, &c., he prayed the benefit of clergy—which being granted,

The Court gave judgment that he be burnt on the brawn of his left thumb, and discharged:

But on cause shewn, the Court, ASHE, J. and SPENCER, J., suspended the execution of this sentence until next term.

He was bailed and entered into recognizance, himself in the sum of £3,000, and his two securities in that of £1,000 each.

At May Term last, the Court (SPENCER, J., *alone*,) met; but the small-pox raging then in Newbern, no business was done, and the Court was adjourned to the first day of the Court in course.

And at this term, he was brought to the bar, and pleaded a pardon from the Governor, which being read and inspected by the Court, ASHE, J. and SPENCER, J., was allowed, and the prisoner discharged.

*** The same indulgence has since been shewn to the defendants, at Wilmington, in the case of *The State* v. *Snead*, and at Newbern, in that of *The State* v. *Hyson*.

NOTE.—See *State* v. *Ward*, 2 Hawks, 443.

NEWBERN, *November Term*, 1778.

WRENFORD v. GORDON.—Page 54.

Where a writ of replevin was sued out against the defendant, who had been in quiet possession of the slave for many years, merely to try the right of the parties to the slave, it was quashed as being irregular, wrongful and oppressive.

Replevin. *Nash*, for the defendant, moved that the writ be quashed; it having irregularly issued.

It appeared by affidavits filed, that the defendant and her late husband had been in quiet possession of the slave, who had been taken in pursuance of this writ, for several years. And that it was merely in order to try the right of the parties to him that the writ had been sued out.

By the Court, SPENCER, J. alone. The taking out of this writ for this purpose, is irregular, wrongful and oppressive. Let it be quashed.

Nash afterwards moved for and obtained a writ *de returno habendo*. Upon which the slave was restored to the defendant, *ut audivi*.

NOTE.—Replevin cannot be supported unless a *taking* is proved. *Cummings* v. *McGill*, N. C. Term Rep., 98. S. C. 2 Murph. Rep., 357. See the act of 1828, (1 Rev. Stat. ch. 101,) which provides for bringing the action of replevin for slaves in certain cases.

November Term, 1784.

GOODRIGHT ON THE DEM. OF McILWEAN v. SHINE.—Page 54.

Ejectment. At the last term, judgment was taken by default against the casual ejector, and a writ of *habere facias possessionem* awarded and executed, and now the judgment was set aside on payment of full costs; Shine making himself a defendant, and agreeing not to delay the trial.

And on motion of ——— his counsel,

The Court directed a writ to issue to the sheriff, to reinstate Shine in the possession of the premises.

NOTE.—See *Beaner* v. *Pilley*, 2 Car. Law Repos., 444. *Bledsoe* v. *Wilson*, 2 Dev. Rep., 314.

NEWBERN, *March Term*, 1791.

STANLY'S EX'R. v. HAWKINS.—Page 55.

A person who contracts as agent for the State is not personally responsible.

At May Term, 1790, the jury found in this case the following special verdict, to-wit:

"The jury find that the defendant as commercial agent for the State of North Carolina, did purchase of John W. Stanly & Co. on the 3d of June, 1780,

One Hhd. rum, 110 galls., at £50,	£5,500 00 00
On the 27th, 112lb. coffee, at £10 8,	1,164 16 00
2¾lb. of Castile soap, at £8,	22 00 00
Amounting in the whole to	£6,686 16 00
Equal as per scale of depreciation, to	£89 3 00
And, on July 8th, of the same year, seven hhds. rum, containing 800 galls., at £48,000, equal as per scale of depreciation, to	£533 6 8
The debit amounting in the whole to	£622 9 8

"They also find that the said Benjamin Hawkins hath paid to the plaintiff, on the 6th day of July, 1780, a warrant for £20,200, equal per scale to £224 8 10, and 580 dollars in specie, leaving a balance due to the plaintiff of one hundred and sixty-six pounds and ten pence.

"Whether the law be for the plaintiff or defendant, upon the facts aforesaid, the jury pray the advice of the Court. If the law be for the plaintiff, they find the defendant did assume and assess the plaintiff's damage to one hundred and sixty-six pounds and ten pence: if for the defendant, they find the defendant did not assume."

And at this term the Court, ASHE, J. and WILLIAMS, J. gave judgment for the defendant.

NOTE.—See acc. *Hite* v. *Goodman*, 1 Dev. & Bat. Eq. Rep., 364. *State* v. *Justices of Moore*, 2 Iredell's Rep., 435.

NEWBERN, *September Term*, 1791.

SIMPSON v. CRAWFORD.—Page 55.

A writ improperly issued by the clerk in *case* may be altered to *debt*, after it is returned executed.

Jones, for the plaintiff, moved for leave to alter the *capias*

which had been returned "*executed.*" He observed that it had been issued by the clerk: that the instrument on which the suit was brought was a *deed*, and the *capias* had been filled up in *case:* while it ought to have been in *covenant.*

The defendant was not in Court, and none of the gentlemen of the bar present, was employed for him.

The Court, ASHE, J., SPENCER, J. and WILLIAMS, J., made no observation, but permitted the *capias* to be altered.

NOTE.—See *contra Anonymous*, 1 Hay. Rep., 401. But see note to *Cowper* v. *Edwards*,1 Hay. Rep.,19, and the cases there referred to: and also the cases of *Johnston* v. *McGinn*, 4 Dev. Rep.,277. *Grist* v. *Hodges*, 3 Dev. Rep.,198. *Alston* v. *Hamlin*, 2 Dev. & Bat. Rep., 115. *Green* v. *Deberry*, 2 Iredell's Rep., 344. All amendments made either by consent or by leave of the court ought to appear on the record. *Shearin* v. *Nevill*, 1 Dev. & Bat. Rep., 3.

NEWBERN, *March Term*, 1792.

HENRY v. SMITH.—Page 56.

An infant who has been arrested in a civil suit, will be discharged from custody on motion, upon the fact of infancy being made to appear to the court by inspection or the examination of witnesses.

Henry had sued Smith in the County Court of Craven. Smith neglected giving bail, and was committed.

Woods, for the defendant, moved to have him brought into Court, suggesting that he was a minor, and that the property for which he was sued had not been delivered to him. Which

The Court, SPENCER, J. and M'COY, J., granted.

Whereupon he appeared—and the Court, not being satisfied by inspection that he was a minor, a witness was sworn, and deposed that the defendant was a minor of about the age of seventeen.

And he was, on *Woods'* motion, discharged.

IN EQUITY, NEWBERN, *September Term*, 1796.

CORR'S EX'RS v. PAGE.—Page 56.

It was resolved by the Court, M'COY, J., and STONE, J., that in bills to perpetuate testimony, if the defendant makes no defense, either by plea, demurrer or answer, he is not entitled to have a Solicitor's fee taxed in the bill of costs.

Baker, for the complainant.
Taylor, for the defendant.

IN EQUITY, NEWBERN, *September Term*, 1796.

SHEPPARD v. COLLINS, et al.—Page 56.

At March Term last, the complainant obtained a rule that the defendant answer within four months.

The answer not having been filed within that period, *Baker* for the defendant at this term prayed that it might now be received.

This was strenuously opposed by *Woods* for the complainant, who insisted that the defendant should at least pay costs.

But the Court, M'COY, J., and STONE, J., ordered the answer to be received.

NEWBERN, *March Term*, 1795.

STANLY'S EXECUTOR v. GREEN.—Page 60.

In an action of debt on a sealed note, if the plaintiff of record is merely nominal, and the real interest in the note is in another, a set-off against the latter may be admitted in evidence.

Where a set-off is pleaded, if the plaintiff wish to avoid it on the ground of its being out of date, he must reply the statute of limitations.

This was an action of debt on a sealed note, to which the defendant pleaded on the docket among other pleas "*set-off*;" but no plea was drawn out at large and filed.

On the trial the defendant's counsel produced as evidence of a set-off, a letter from one Hooper in South Carolina, to the defendant, dated about the year 1785, in which he acknowledged that he had received gold for the benefit of the defendant, a number of certificates, and in the same letter stated the proceeds of the sale. The defendant's counsel offered at the same time to prove that the real interest of the note was in Hooper, and that Stanly's executor was merely a nominal plaintiff.

To this evidence two objections were taken by the plaintiff's counsel. 1st. That as Stanly's executor appeared in the record to be the real plaintiff and only person entrusted in the note, no evidence could be received to contradict the record, nor prove the property of the note to be in any other person, and consequently no debt, except one due from Stanly, could be set against it. 2d. That the demand set up by Hooper was barred by the statute of limitations, and was not such an existing debt as would support a suit, and therefore would not be set off.

But these objections were both overruled by the court, ASHE, J., and WILLIAMS, J., who said that if the interest of the note was in Hooper, then demands of the defendant against him might be set up against it, for the debts were in fact mutual—that as the defendant had pleaded his set-off, the plaintiff ought to have replied the statute of limitations—and that a plaintiff can no more oppose this statute

to a defendant's pleas without replying it, than a defendant can to the plaintiff's declaration without pleading it.

The defendant's counsel was proceeding to prove that the interest of the note was in Hooper, when the fact was admitted by the plaintiff's counsel and the set-off allowed.

Woods, for the plaintiff.

Badger, for the defendant.

Quære of the propriety of this decision. 1. Because by no construction of any part of the record, could it be inferred that Hooper was concerned in interest. The fact ought to have been set forth in the plea, and although it is not the general practice of the bar in this State, to draw out the pleadings at full length; yet every material fact which cannot be intended in the ordinary form of the plea, ought at least to be suggested on the docket. 2. Because it is reported that the Superior Court setting at Edenton had before determined that the words "*set-off*," written on the docket should be considered as a notice of set-off only, and that all objections to the demand set up, might be taken at the trial.

Ex relatione Woods.

NOTE.—Upon the first point see *Hogg's Ex'rs* v. *Ashe*, 1 Hay. Rep., 471 (S. C. Conf. Rep., 3,) and the cases referred to in the note thereto, and also the cases of *State Bank* v. *Armstrong*, 4 Dev. Rep., 519. *Haywood* v. *McNair*, 3 Dev. Rep., 231. S. C. 2 Dev. & Bat., 283. *Haughton & Booth* v. *Leary*, 3. Dev. & Bat., 21. *Bunting* v. *Ricks*, 2 Dev. & Bat. Eq. Rep., 130.

As to the second part see *McDowell* v. *Tate*, 1 Dev. Rep., 249. *Worth* v. *Fentress*, Ibid, 419.

NEWBERN, *March Term*, 1795.

REGULA GENERALIS.—Page 61.

By consent of the bar, and with the assent of the Court, it is ordered, that commissions to take testimony *de bene esse*, where witnesses reside within the State: and *absolute* when without the State, may issue in all cases.

Reasonable notice to be given the adverse party.

IN EQUITY, NEWBERN, *September Term*, 1795.

BIZZELL v. BURKE.—Page 61.

In this suit it was ruled by the Court, M'COY, J. and STONE, J., that upon the injunction dissolved, and the bill continued as an original, if the complainant neglects to take out depositions or subpœna witnesses, the suit is discontinued, at the second term after the injunction dissolved.

Ex relatione STANLY, *Magistri.*

NOTE.—See *Anonymous*, 1 Hay. Rep., 162, and the cases referred to in the note.

IN EQUITY, NEWBERN, *March Term*, 1796.

PATTERSON v. SAVAGE'S EX'RS.—Page 61.

The Court, HAYWOOD, J. and STONE, J., held that, if the death of a party is suggested, the suit goes off at the second term after the suggestion.

Witherspoon, for the complainant.
Baker, for the defendant,

NOTE.—See *Collier* v. *Bank of Newbern*, 1 Dev. & Bat. Eq. Rep., 328.

IN EQUITY, NEWBERN,——*Term*, 179–.

REGULA GENERALIS.—Page 62.

Upon completing depositions, the party taking the same may give notice to the opposite party to attend before the Master, for the purpose of being present or proving the notice given of the taking of such deposition—and the Master

upon the return of the notice served, is to examine the evidence offered, respecting service of notices and also hear and consider any objection made against the same. If the Master shall be of opinion that the notice was duly served, or the deposition properly taken, he shall indorse his judgment respecting the same upon the deposition, and make a memorandum thereof upon the docket.

Provided, that notice to attend before the Master in vacation, shall be served on the opposite party, at least ten days before such attendance required, and when the notice shall be served on the party in term time, and the party shall be at the time of service in the town of Newbern, then one day's notice.

If either party be dissatisfied with the determination of the Master, he may except thereto when the case shall be reported by the Master, and determined by the Court.

NEWBERN, *March Term*, 1792.

THE STATE v. HIGGINS.—Page 62.

Where a clerk to a merchant, whose store he attended, had sent goods from the store to a person at a distance with directions to sell them, and he had not communicated this transaction to his principal or any of his other clerks, nor made any entry of it in the books, on an indictment under the Stat. 21st. Hen. 8, ch. 7, (See 1 Rev. Stat., ch. 34, sec. 19,) the judges differed on the question whether he could be convicted under the statute, but agreed that he might be convicted of felony at the common law. Upon the conviction at common law, judgment was arrested, but upon what ground does not appear.

Indictment on the 21 Hen. 8, 7, 188. It appeared in evidence that the prisoner was a clerk to the prosecutor (a merchant) whose store he attended: that he had sent a parcel of goods from the store, to a person who resided at a distance, with directions to sell them: that he had not communicated this transaction to the prosecutor, or any of his other clerks, and had made no entry of it in the books.

Harris and *Martin*, for the prisoner, contended that he could not be found guilty on this indictment.

1. Because he stood not to the prosecutor, in the relation of a *servant*, which the statute requires, and the indictment describes.

2. Because the goods embezzled came *not* to his hands by a delivery of the nature of that described in the statute, and the indictment.

I. They said that the words of a statute are to be taken in their ordinary and most known signification, not so much regarding the propriety of grammar as their general and popular use: and cited 1 Comm., 59.

Now the statute requires that the offender be a *servant*. Perhaps this word in its most extended grammatical sense, may include *every* person laboring for another, and receiving hire or payment. In its ordinary and popular signification, it reaches no farther than family domestics, and personal attendants. The Painter who draws my picture, the Surgeon who pulls out my tooth, the Taylor who makes my clothes, the Clerk who writes in my office, or attends to my store, are in the first sense my servants; they all labour and are employed by me, and receive payment. Yet were I to describe them by the appellation of my servants, I would not be understood to mean them; or, if I was, I should be censured for giving them an appellation which in the general and popular acceptation of it is confined to persons of an inferior rank.

A celebrated crown law writer, after speaking of the statute upon which the prisoner is indicted, and the 3 & 4 Will. & Mar., 9, says "to the foregoing larcenies, by breach of trust, by MOENIAL *servants*, and lodgers, the Legislature has added two others," &c. 1 Hawk., 139, sect. 17. He certainly understood that the *servants* to which the statute relates, are only such as are *mœnial*, who live *intra mœnia* within the walls, in other words DOMESTIC *servants*.

The author of the commentaries, after mentioning *mœnial servants*, apprentices and labourers, says "there is a fourth species of servants, "*if they may be so called:* stewarts,

FACTORS and bailiffs." 1 Comm., 427: which shows that, in his apprehension, the epithet of *servants*, in ordinary and popular use, is not applicable to Stewarts, Factors, &c.

The same writer, in the next page, says, "a master may by law, correct his apprentice or *servant*." Does he mean that a gentleman could *flogg* his stewart, or a merchant his factor? Certainly no.

If the rule of construction, which we have laid down from the commentaries, be a true one: and if the word servant, in its common and popular use, does not comprehend that description of persons, employed in the capacity in which the prisoner attended the affairs of the prosecutor, it follows that he did not stand to him in the relation contemplated by the statute.

This construction would be the true one in ordinary acts, but this is a penal statute—one penal in the highest degree. Penal statutes must be construed *strictly*. 1 Comm., 88.—Consequently should the word *servant* be restrained to its ordinary signification.

II. The statute confines the things which may be subject of the offence to such as caskets, jewels, money, goods and chattels, as are delivered to servants *safely* TO BE KEPT *to the use of their masters or mistresses.*

The evidence here is of goods *delivered* TO BE SOLD.

Badger, for the State. Whatever else may be said, it surely cannot reasonably be denied that the present case is strictly within the mischief for which the act intended to provide a remedy, that is to say, the stealing of goods by persons entrusted to manage them for the owner, an offence not sufficiently punishable at the common law. A merchant's clerk, as the prisoner was, has greater opportunities to embezzle property, than a *servant* of any other description; having by the nature of his business, the custody of more goods and more money. It seems peculiarly necessary therefore, that such persons should be included in this act: for otherwise we are guarded against the smaller evil, and exposed without defense to the greater.

And I contend that this case is also within the *words* of the act. The words *master* and *servant*, according to their popular use, imply a certain relationship, and wherever that relationship is found, there is properly a master and servant. This relationship consists of the right of superiority and command on one side, and the duty of service and obedience on the other, and this certainly exists between a merchant and his clerk. The nature of the service is an immaterial circumstance; for whether a man assume the care of a stable or store, the business of a groom or clerk, he is still a servant; if he have taken upon himself the duty of obedience, and given the rights of authority to another. The right to command, the obligation to obey, is equal in both cases. The time and service in both instances equally belong to the hirer. The contract which produces the relationship, is the same, and therefore the relationship itself is the same. The politeness of modern times it is true, has not often applied this term to merchants' clerks, some of whom are of good families, and would resent the appellation: but this by no means proves that they are not as clerks, substantially servants, and therefore strictly within the meaning of this act.

The term *servants*, in common language, is very seldom applied to *apprentices* to merchants, and to several kinds of artificers; yet it never has been denied, I believe, that they are properly servants, and but for the express exception, would, as such, be within the act.

The very expression, "MŒNIAL *servant*," which is very common, implies that there are servants of a different kind, and otherwise the epithet mœnial, would be insignificant and useless.

The word servant, is used in the act without any epithet to qualify or limit its meaning, and yet it is contended that this general term, which applies equally to all kinds of servants, shall be confined to one kind only, *to-wit*, mœnial servants. Had such been the intention of the Legislature, that common expression must have occurred to them, and would certainly have been adopted. I admit that the

mechanic to whom we send a job, is not our servant, nor do the principles for which I contend, imply that he is. There is no authority on one side, no subjection on the other. The mechanic is *employed*, not *directed*. His time is his own, not ours. He may postpone our work to make room for another's. The relationship between him and us supposes no superiority on our side, and therefore it is not the relation which exists between master and servant.

As to the second point,

The goods it is true, were entrusted to the prisoner to be sold, but they were also in his custody to be *kept* till the sale, and at the time of embezzlement they were in his *keeping*, not having then been sold. His authority to keep had not then expired; he therefore held them under that authority, and therefore his case is within the act.

'Till a fair purchaser offered, his authority was merely to *keep*.

Neither of these objections is entitled to much favor. The first admits that persons standing substantially in the same situation with the prisoner, only performing different services, and furnished by the nature of their employments, with less power to do mischief, would for the same act be punishable as felons. The second admits that the prisoner, who attempted to ruin his employer, by embezzling his property, was entrusted to sell it for his benefit, was under engagements, and had received wages for that purpose.

Admitting however, that the prisoner is not to be considered as a servant, and that the goods were not delivered him to *keep*, admitting that he is not within the reach of the statute, then he is guilty of larceny by the common law.

It is true that a *taking* is essential to a larceny; and it is said that this offence cannot be committed where there is a delivery of goods from the owner to the offender upon trust. And the instances mentioned, are the loan of a horse, and the sending of goods by a carrier. These instences, however, it is to be observed, differ widely from the present case, the owner in these instances parting entirely with the possession, which, for the time belongs exclusively to the carrier,

and borrower, each of whom has a special property in the thing delivered. In the present case the offender had not the exclusive possession. The owner had not parted with *his* possession. The goods were in his store, subject to his control and direction, which he occasionally exercised. Had a trespass been committed on these goods, the clerk could not have maintained an action in his own name, but the suit must have been brought in the name of the owner. During every moment of time whilst the prisoner was in the owner's store, the owner might have done whatever he pleased with the goods. The store in which the goods were kept was in *his* possession, nay the prisoner himself was in *his* possession, (if I may so speak) having engaged to serve him for hire. As the owner had not *parted* with the possession of the goods, of course the prisoner could not *have* the possession of them. If he had anything, therefore, it was only a care and oversight, and the embezzlement of goods in such a case was felony at the common law. The distinction is clearly expressed in 4 Blackstone, 231. If he had not the possession, but only the care and oversight of the goods, the embezzling of them is felony at the common law. Here the goods were under the prisoner's care, not in his possession.

It remains therefore only to shew that though the indictment be founded on the statute, the prisoner may be found guilty of the offence at common law, and to this the 2 Hawk P. C., 251, is in point.

Whereupon *Harris* and *Martin* prayed to be, and were heard, on the latter part of the argument of the counsel for the State.—They said—

The charge against the prisoner presenting itself under another point of view, it behooves us to consider whether the facts charged in the indictment, constitute an offence at common law?

Unless it was an offence at common law, at the time that statute was passed, it is certainly none at this day. Of this the statute furnishes us a negative proof. In the preamble, it is said, after stating such a fact as the one in the indictment, which misbehaviour so done, was *doubtful* at the common law, whether it was felony or not.

The preamble of a statute is deemed true, and a good argument may be drawn from it. 1 Inst., 11.

Hence, it must be deemed true that it was doubtful. If it was *doubtful* THEN, it cannot be *certain* NOW. With this negative evidence in our hands, we ought not to fear an adverse verdict; we may claim a favorable one. For in *dubiis semper in favorem vitæ.*

Yet, in taking a retrospective view of the principal and most important decisions of Courts before the reign of Henry VIII., we will perhaps incline more strongly to believe that, when the statute was passed, the offence under our consideration was deemed a *private injury* only, and no criminal offence.

We do not mean to say, that the time never was, when such a misbehavior was considered as a criminal offence, nay as felony. In England, as in every other country, during the early age of civil society, no difference was made between moral and civil offences. Many facts were considered as larcenies, which have since been looked upon only as *private* injuries: thus bailiffs, receivers, and administrators, were said to *steal* goods, if they did not give in their accounts: false weights and measures, tricks in trade, and other deceits and impositions, are described in the Mirror as instances of larceny. 2 Reeves, 351.

Towards the year 1470, under the reign of Ed. IV., it was held that where a person entrusted goods to the care of a servant, the servant could not take them feloniously, because they were in his possession. 10 Ed. IV., 14.

Above three years after the following case happened:

One had bargained with a man to carry certain parcels of goods to Southampton. The man took the parcels, carried them to another place, broke them open, took out the goods, and converted them to his own use. Whether this was in law a larceny, was debated with much difference of opinion. It was argued that a possession of the goods was given by the bailment of the owner; and neither felony nor trespass could be committed of them by the bailee; for he could not be said to take them *vi et armis* and *contra pacem.*—On the other side it was said, that a man's act

becomes felony or trespass according to the intent. If a man abuses a distress, he is a trespasser; and so here all confidence implied in the bailment, was superseded by the taking, which discovered his intent to have been bad from the beginning. It was also said, that this was different from a bailment; for it was only a *bargain to carry;* and what followed shews that this was only a pretense to gain an opportunity for stealing. At length, one of the justices had recourse to a refinement which admitted some of the above reasoning, but exempted this case from the conclusion following upon it. He admitted, that a man who has the possession of goods by bailment, cannot commit felony of them; but here, he said, the *goods* within the parcels were *not* bailed to the carrier, but the *parcels themselves;* and therefore taking *them* was not felony: but when he broke them open, and took out the *goods*, he did what he had no warrant for, and appeared in a very different light in the eyes of the law. Thus, for instance, if you deliver a tun of wine to a carrier, and he sells it, this is neither felony nor trespass; but if he takes any out of the tun, and sells it, that is felony. In like manner, if I leave the key of my chamber with any one, and he takes anything out of it, this is felony. The reason to support these cases was, that the things not specifically and expressly delivered, were not in truth bailed, and therefore the party, in *taking* them, intermeddled where he had no trust.

These were the arguments used before the council: the case was afterwards adjourned into the exchequer chamber, and the opinion of all the judges was taken. There it was agreed by *all* the judges, except one, that generally where goods were bailed to another, he could *not* take them feloniously. They held also, that when a possession so obtained had once determined, then the bailee might commit felony in taking them; as, if I bail goods to a man to carry them to my house, which he performs, and afterwards takes them, it is felony; because his possession under the bailment ceased when he delivered them at the house. They argued some points upon the nature of possession. If a guest in an inn takes a cup, he is a felon, because he had not properly a possession, but only the use of it while there. The same of

a cook or butter; they are only ministers as to the things within their care; but have no possession, which, in these cases, is always construed by law to be in the master. But it would be different, perhaps, says the book, if goods were *bailed* to a servant; for as they then would be in the actual possession of such servant, he could *not* commit felony of them.

After all, as to the principal case, whether it was agreed, that the bailment ceased upon breaking the parcels open, and the carrier thereby forfeit the legal privileges annexed to him as bailee, and in so taking the goods he was considered a common person; or whether it was upon the whole thought, that this was not a bailment, but merely a bargain to carry; it is not stated in the report upon which of these grounds they determined; but it was certified to the chancellor by the major part of the justices, that this man was guilty of felony. 3 Reeves, 410.

Towards the year 1485, some questions of larceny similar to the one above cited were debated.

It was propounded by Hassey, who was then chief justice, whether, if a shepherd took the sheep, or a butler the plate, under his care, it could be called felony; he himself thought it was; and related the case of a butler who was hanged under such circumstances; to which a similar case was added by Haugh, of a goldsmith, who had taken some things that were entrusted to his charge. In answer to these, *Brian* argued that it could not be felony, because neither of these persons could be said to take the things *vi et armis*, while he had them under his care: and of this opinion were the justices. This was giving a blow to the determination in the time of Edward IV., and expressly contradicted some cases that were there taken for settled law, and argued upon as such; especially that of the butler. However, we find this case of the butler was understood otherwise some years after, and a distinction was taken between the possession a butler has while *in* the master's house, and the possession of a servant entrusted *out* of the house. It was propounded by serjeant Pigot, in the court of king's bench, to serjeant Cutlar, in this way: If I bail a bag of silver to my servant to keep, and he goes away with it,

can this be felony? Cutler says yes; for as long as he is in my house, or with me, that which I have delivered to him is adjudged in my possession; thus if my butler, who has my plate in his custody, runs away with it, this is felony; the same if a person having the care of my horse goes off with it; because in both these cases the thing remained all along in my possession. But if I deliver a horse to my servant to ride to market, and he rides away with it, this is no felony; because he came to lawful possession of the horse, by the delivery out of my custody. The same if I give him a bag to carry to London, or to pay away to some one, or to purchase something; if he goes away with these it would not be felony; because they were out of my possession, and he had lawful possession of them himself. To this Pigot assented, adding that it might, in all these cases, have an action of detinue or account, which idea of *possession* is consonant to one of the principles laid down in the case so often alluded to. 4 Reeves, 178.

In the time of Henry VIII., says Mr. Reeves, a breach of trust, and embezzlement of effects confided to the custody of a person, were thought not to be a *felonious taking and carrying away*. This kind of fraud had of late grown common, from the impunity it enjoyed; and many now thought, that as it carried in it much of the mischief, it deserved the punishment annexed to felony.

The statute upon which this man is indicted, was accordingly passed. It is mentioned in the preamble of this act, as a doubt whether this kind of taking was larceny; a doubt raised, perhaps, by the case determined in 13 Ed. IV., which we have before mentioned, and which is thought, and not improbably, to have given some occasion for making this statute.

Though the instance of bailment there before the Court was, or might be thought, something like a breach of trust reposed in servants, and was determined to be felony; yet the principles there laid down and agreed to, almost unanimously, led to an opposite conclusion; and there needed all the helps of distinctions and technical nicety to take even that case out of the general rule there laid down. Besides,

there is at the bottom of that report an opinion, which qualifies any inference which otherwise might be possibly drawn from it as to this; for admitting that a cook and butler would be guilty of felony, if they converted the goods within their respective departments to their own use, it is there said, that if the same things were bailed to a servant, *perhaps*, as they would be in his possession, he could not commit felony of them. About three years before, it was said by one of the judges, "If one commits the care of his goods to his servant, the servant cannot take them feloniously, because they were in his possession." These were direct authorities upon the point, and, joined with the reasoning upon *bailment* and *possession*, sufficiently shew what were the opinions of lawyers in those times respecting this question. 4 Reeves, 284.

The case of the carrier, the butler, the guest, fall short from the present. Their possession and power over the things in their hands was temporary. They could not transfer the property; the master was, at all events, to have it back again. In no case was it to be otherwise. In this, the clerk might when he pleased, lawfully dispose of the property, that it should never return to the merchant. His possession was quite of a different nature. Theirs to *keep;* his to *sell*.

So strictly have courts adhered to the notion of possession and its consequences, that in 3 Hen. VII. the judge, went so far as to agree with *Brian* (who, it may be observed, was one of the judges that dissented from the opinion of felony in 13 Ed. IV. in the exchequer-chamber,) that neither a shepherd nor a butler could commit larceny of their sheep or plate, because it could not be done *vi et armis;* so much were the opinions changed from what they had been in the reign of Ed. IV. when these cases were stated for felony, and allowed without debate. This doctrine we have seen was again discussed in the last reign; and it seemed, in the instance there stated, to be agreed upon so decidedly *against* the felony, as to call for a formal declaration of the law by statute. Thus stood the law upon this subject towards the end of Henry VII.'s reign, and so we may suppose it was understood at the time this statute

was made. After all these authorities, concludes Mr. Reeves, we may be excused in differing from those who think that the point of law which is the subject of this statute was so well settled before, that the doubt about it mentioned in the preamble, is one of those which have much enervated the principles of common law, and could not be the doubt of any lawyer. 4 Reeves, 285.

Lord Hale considers the offence charged on the indictment, as created by the statute. For, he says: Before the statute of 21 Hen., chap. 8, 7, if a man had delivered goods to his servant to keep or carry for him, and he carried them away *animo furandi*, this had *not* been felony, but *by that statute* it is made felony, if of the value of forty shillings; but the offender shall at this day have his clergy; but yet if an apprentice doth this, or if a man delivers a bond to his servant to receive money, or delivers him goods to sell, and he accordingly sells and receives the money, and carries it away *animo furandi*, this is neither felony at common law, nor by this statute. 2 H. H. P. C., 505.

The same doctrine is laid down, Co. P. C., p. 105, 26 H., 8, Dy. 5, a. b.

Having, we trust, satisfactorily shewn, 1st, that the prisoner is not within the reach of the statute, and 2ndly, that the facts charged, do not constitute the offence of larceny, we proceed to shew that even if the prisoner was guilty of larceny, he cannot be convicted of it upon the indictment, which the grand jury have found against him.

It is not contended by the counsel for the State, that if he be guilty of any offence at common law, he may be guilty of anything else but larceny.

Hawkins has been read, in order to establish the position, that though an indictment be founded on a statute, the prisoner may be found guilty of an offence at common law.

Although the truth of this position, in a certain degree, is not to be denied now, it is safe to say, that it is not generally much less universally true. The origin of it may be traced to Page's case. The court, in that case, decided that if persons be indicted, especially on the statute of stabbing, 1 Jac. 16, 6, 351,

and the evidence be not sufficient to bring them within the statute, they may be found guilty of general manslaughter, at common law, and the words *contra formam statuti* rejected as senseless.

If the present indictment did not conclude *contra formam statuti*, it would be insufficient, and no judgment could be given upon it: because the offence charged is only prohibited by statute, and not by the common law. See 2 Hawkins, 251.

If an indictment on the statute of stabbing, above cited, did not conclude *contra formam statuti*, still it would be sufficient and good: judgment could be given upon it, as in the case of general manslaughter, or manslaughter at common law, because the facts charged in such indictment, are offences both at common law, and under the statute.

The same verdict and judgment may be given upon such an indictment, concluding *contra formam statuti*, in case the evidence does not bring the prisoner within the statute.

Thus if one be indicted, on the 3 El., 9, 304, for perjury, and it be not stated, that he *wilfully and corruptly* committed perjury, but either that he *falsely and voluntarily*, Savil, 43, or *falsely and corruptly*, Hetl., 12, or *falsely and deceptively*, 2 Leo., 3 Leo., 230; Shower, 190. In all these cases, the indictment is bad for an offence on the statute, but is good at common law.

Yet, if the fact proved, amounted to the crime of larceny, still the prisoner at the bar could not be found guilty of that offence, because it is not charged in it.

It is not sufficient that the offence charged, be prohibited both at the common law and by the statute, in order to support a verdict, by rejecting the words *contra formam statuti:* it is still necessary that the technical words, requisite in the description of the offence at common law, be inserted in the indictment.

An indictment ought to have proper terms of law. 4 Comyns, 398.

The word *cepit* is necessary and requisite in an indict-

ment for larceny. 2 H. P. C., c. 25, § 55, p. 224; no other will answer.

It is not in the indictment.

The position established in the latter part of the argument for the State is neither *universally* or *generally* true. It is true only in the case of an indictment respecting facts prohibited, both at the common law and by statute: neither is it true in all such cases, for it will fail, if the indictment does not contain a technical description of a common law offence.

I. The prisoner therefore cannot be found guilty under the statute.

1. Because he does not stand in that *relation* which the statute requires, and the indictment describes.

2. Because the goods did not come to his hands, by the *delivery, which alone can* bring his offence within the statute.

II. He cannot be found guilty at the common law.

1. Because the facts charged are made criminal by the statute *only*.

2. Because the offence of larceny is not *charged* in the indictment.

Williams, J. told the jury he thought the prisoner might be found guilty *either* at common law, or upon the statute.

Ashe, J. thought he might be found guilty at common law, but could *not* be convicted on the statute.

The jury withdrew, and found the prisoner *not* guilty of the felony upon the statute, but *guilty* of the felony at common law.

On the next day, the prisoner was brought to the bar, and being asked what he had to say, &c.

Harris and *Martin* moved an arrest of the judgment, and filed reasons.

The counsel for the State, not being ready to enter upon an argument on this motion, the consideration of it was postponed till next court: and.

On motion of the prisoner's counsel, it was ordered that the prisoner be discharged from confinement, on his giving

bail, before some of the justices of the county of Craven, residing in the town of Newbern.

In September, 1792, there was no court.

And at March Term, 1793, the consideration of the motion in arrest of judgment was taken up, and without any argument.

JUDGMENT ARRESTED.

*** The prisoner had remained in jail, not being able to procure bail upwards of a twelve months, and Mr. Sol. Gen. JONES (partly out of compassion to him, and partly on account of the late hour at which the court came to the cause, on the last day of the term) did not oppose the motion in arrest.

NEWBERN, —— *Term*, 179–.

SALMON v. SMOOT & BOND.—Page 72.

When the sheriff has returned that a garnishee is not to be found, and he comes into court about other business, he shall be compelled to answer to his garnishment.

Original attachment. The plaintiff had directed Richardson to be summoned as a garnishee, and the sheriff had returned, on the back of the attachment, that he was not to be found.

Richardson came into the courthouse about other business, and *Davie* for the plaintiff, moved that he might answer to his garnishment.

This was objected to by *Martin* for the garnishee, who said that Richardson could not be compelled to answer before due service. A garnishee may be considered as a witness, or as a party to the suit.

A witness is not compellable to give evidence if he has not been legally summoned.

It is no contempt of the court, for a by-stander to refuse to be examined. *Bowles* v. *Johnston*, 1 Blackst. Rep., 26.

The case is much stronger, if he be considered as a party. He must then be regularly brought in, and the law gives him two terms to determine on one of the alternatives, which it holds out to him, either to give bail, suffer judgment to go against him for the whole debt, or submit to an examination.

The court, ASHE, J. and WILLIAMS, J. overruled these objections; saying this matter had been lately debated at Wilmington, and determined against the garnishee.

EDENTON, *October Term*, 1796.

GORDON v. PAYNE & MARE.—Page 72.

Debt on a bond. *Non est factum* pleaded. Robert Egan, the subscribing witness to the bond, having been summoned by the plaintiff, went off sometime before court to New York on his private business. It was admitted that he was dangerously ill there, and that the last that was heard from him, was that he was given over by his physician. Upon this, the plaintiff's counsel offered to prove the hand-writing of the witness, as evidence of the execution of the bond; but

M'COY, J. refused to admit the testimony; and he was nonsuited.

*** Egan was actually dead at the time.

NOTE.—See *Harvey* v. *Jones*, ante 41. *Selby* v. *Clark*, 4 Hawks, 265.

NEWBERN, *March Term*, 1797.

STARKEY'S ADM'RS v. McCLURE.—Page 73.

Where the plaintiff claimed under a division of slaves made by consent of all the joint-tenants, one of the joint-tenants, who held slaves under the same division, but was no party to the suit, was excluded from giving evidence on the ground of interest.

Trover for several slaves. The plaintiffs claimed them under a division (by consent of all parties) of slaves held in joint tenancy under a will, by their intestate, the person under whom the defendant held, and others.

One of those persons, who had taken a lot of slaves under this division, but who was no party to this suit, was introduced on the part of the plaintiffs, to shew that such a division by consent, had been made.

The defendant's counsel objected to that person being sworn, on the ground of interest, and on argument:

The Court, WILLIAMS, J. and M'COY, J. allowed the objection.

Taylor and *Graham*, for the plaintiffs.

Badger and *Harris*, for the defendant.

NOTE.—See *Ferrell* v. *Perry*, ante 27, and the cases referred to in *Farrell* v. *Perry*, 1 Hay. Rep., 2, and also *Haywood* v. *Barnett*, 3 Dev. & Bat. Rep., 91.

IN EQUITY, NEWBERN, *March Term*, 1797.

HUNT v. McKINLAY & WILLIAMS.—Page 73.

When a complainant after the commencement of a term obtained an injunction on a bill returnable to the next term and the defendant moved that the bill and answer might be there read upon an affidavit of the sheriff that he had informed the complainant of his having an execution in his hands against him in time for the bill to have been filed returnable to that term, the Court hesitated to grant the motion, though it was not opposed, but afterwards allowed it.

The complainant, since the beginning of this term, had

obtained an injunction against the defendants, on a bill returnable to September court: and on the first of the Equity days,

Taylor and *Badger*, for the defendants, read an affidavit of the Deputy-Sheriff, stating that he had informed the complainant, forty days before the term, that he had the execution in his hands, requesting him to point out property, on which it might be levied. They said the complainant might have obtained an injunction on a bill returnable to this term, by going to one of the judges, as soon as he knew the execution was out: that his waiting 'till the beginning of the term, shewed an inclination to put off the defendant, &c., and moved the bill and answer might be read.

Martin, for the complainant, did not oppose the motion.

The Court, WILLIAMS, J. and M'COY, J. seemed averse to granting the motion.

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On the next day they directed the bill and answer to be read; but, as they deemed the equity of the bill not sworn away in the answer, the defendants took nothing by their motion.

FAYETTEVILLE, *April Term*, 1791.

SKIPPER v. HARGROVE.—Page 74.

In detinue, the plaintiff shall have judgment, though the slave for which the action was brought, has died since the demand.

Detinue. *Non detinet* and statute of limitations pleaded. The jury brought the following special verdict:

"The jury sworn, find the defendant doth detain the negroes as set forth in the plaintiff's declaration, to-wit, Patience of the price of two hundred pounds, Ally, of the price of £100, and Violet, of the price of £100. They farther find, that the negro Bet, also set forth in the plaintiff's declaration, was at the time demanded, in possession of the

defendant, and the property of the plaintiff; that she was demanded of the defendant, who refused to deliver her up, and that she is since dead. If the law is in favor of of the plaintiff, they find the defendant doth detain the said negro Bet of the price of £50, and if the law is in favor of the defendant, then that she doth not detain the said negro Bet, and assess the plaintiff's damage, to 6 and 6d. costs."

The Court, SPENCER, J. and M'COY, J. gave judgment for the plaintiff.

NOTE.—See *Bether* v. *McLennon*, 1 Iredell's Rep., 523, which refers to, and overrules this case.

FAYETTEVILLE, *April Term*, 1791.

WINDSOR v. WALKER.—Page 74.

One who takes up a boat adrift on a river is entitled to salvage.

Trover. The jury brought in the following special verdict, viz:

"The jury sworn, find the defendant guilty, and assess the plaintiff's damage to £4 and 6d. costs: subject to the opinion of the court, on the following case. The plaintiff owned a boat, which drifted down the river, and was taken up by the defendant, who claimed salvage, and accordingly refused to restore, it until that was paid."

The Court, SPENCER, J. and M'COY, J. gave judgment for the defendant.

NOTE.—See *Winlow* v. *Walker*, 1 Hay. Rep., 192, which decides that the right to salvage in such cases is only to be enforced by detention of the property, and cannot be transferred to a purchaser of the property.

FAYETTEVILLE, *October Term*, 1791.

DEN ON THE DEM. OF MABLY v. STAINBACK & TURNER.—Page 75.

Where a testator, after bequests of negroes and other personal property to several of his children, concluded thus: "Item, the rest of my estate, negroes, stock and house furniture, to be equally divided between my wife M. H., my son H. H., and my daughter R. H.;" *It was held* by WILLIAMS, J., ASHE, J., doubting, that the word "estate" comprehended all the testator could dispose of, real as well as personal.

Ejectment. The jury brought in the following special verdict:

"The jury sworn, find that John Hardiway died, seized in fee of the premises in question, that he executed his will in due form of law, in these words: 'In the name of God, I, John Hardiway, of the county of Brunswick, being in perfect sense and sound memory, do make this my last will and testament, revoking all others. My soul I commit to Christ, who redeemed it, my body to be decently buried, and for my estate that God has blessed me with, I give as follows, to-wit, I give to my daughter Frances Caudel the following negroes, Little Tom, David, Burnett, Harry, Sue, Sterling, to her and her heirs forever. Item, I give to my son, Marcus Hardiway, the following negroes, Great Tom, Isabel, Sam, Little Hannah, Bob, Frank, to him and his heirs forever. Item, I give to my daughter, Sarah Hardiway, the following negroes, Nat, Lucy, Lydia, Jane, Sall, Senos, to her and her heirs forever. Item, I give to daughter Nancy Hardiway the following negroes, Patty, Claris, Let, Little Peg, Old Hannah, Old Lewis. Item, I do also give to my son, Marcus Hardiway, one horse, known by the name Dick, and one feather bed, and to my daughter, Frances Caudel, the filly known by the name of Mark Anthony. Item, the rest of estate, negroes, stock and house furniture, to be equally divided between my wife, Mary Hardiway, and my son Hartnell Hardiway, and daughter Rebecca Hardiway. I likewise do appoint my son Marcus Hardiway and William

Caudel my executors, whereunto I have set my hand and fixed my seal, this ninth day of December, in the fourth year of our commonwealth.

Test,

WILLIAM HARRISON,

her JOHN HARDIWAY, [L. S.]

R o⋈ STEWART,

mark.

JAMES OWEN.'

That he died in the year 1779, leaving Marcus Hardiway his eldest son and heir-at-law, and one of his executors.—That Marcus Hardiway died, having entered on the premises, that the plaintiff is lessor of the co-heirs of said Marcus: they farther find that the defendants are lessees of the widow Mary Hardiway, since Mary Clark and her children Hartnell Hardiway and Rebecca in said will mentioned."

Taylor, for the defendant.

Moore, for the lessors of the plaintiff.

WILLIAMS, J. was decidedly of opinion that the word *estate* comprehended all a man could dispose of, real as well as personal.

ASHE, J. doubted.

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The suit was afterwards taken out of Court.

NOTE.—See acc. *Sutton* v. *Wood*, Conf. Rep., 202. *Foster* v. *Craige*, 2 Dev. & Bat. Eq. Rep., 209. See also *Tolar* v. *Tolar*, 3 Hawks, 74. *Clark* v. *Hyman*, 1 Dev. Rep., 204.

FAYETTEVILLE, *October Term*, 1792.

HODGES v. CLINGON.—Page 76.

A note for £100 payable in tobacco is not negotiable.

Case. The jury found the following special verdict:

" The jury sworn, find that the defendant did assume;

find no set-off, find the defendant did not take the benefit of the act of insolvency, and assess the plaintiff's damage to £73 16s. and 6d. costs: subject to the opinion of the Court, whether the note on which the plaintiff's action is grounded, is a negotiable note within the statute; if it is, they find for plaintiff, if not, for defendant."

The note was for £100 currency, payable in tobacco.

Taylor for the defendant argued, that no decision upon the 3d & 4th Anne, 9, to which our act of 1762 was in analogy, was to be found, that gave negotiability to notes, except they were for the payment of money alone. Besides the many cases establishing the doctrine, that even notes payable in money are not negotiable, if they are contingent, the case of the East-India bond is in point with the present. *Moore* v. *Venlute*. And if anything else is promised besides the payment of money, the note is not negotiable. 1 Sharp., 629.—The design of the act, which was to give to notes a circulation equally beneficial to commerce with bills of exchange, would be frustrated by a contrary decision.

Judgment for the defendant.

NOTE.—See *Jamieson* v. *Farr*, 1 Hay., 182, andthe cases referred to in the note, and also the case of *Alexander* v. *Oakes*, 2 Dev. & Bat. Rep., 513.

NEWBERN, *March Term*, 1797.

DANIEL v. COBB'S EH'R.—Page 77.

The action of detinue survives against the representatives of a deceased person.

At this term, this cause was by consent of the counsel of both parties, reconsidered—and after a very lengthy argument:

WILLIAMS, J. thought the action of detinue, did not survive to the representatives of a deceased person.

M'Coy, J. did not think proper to alter the opinion he had delivered at the last term, and the cause was left open.

*** During the argument of this cause, it appeared to be conceded by the counsel for the plaintiff, Mr. Harris and his Honor Judge Williams, that the *wager of law*, having never been recognized in this State, that part of the common law, which authorizes the admission of that species of evidence, is not in force here. Gen. Davie, and his Honor Judge M'Coy, did not intimate an opinion on that point. *Quære de hoc.*

NOTE.—There can be no doubt now that the doctrine of the common law in relation to *wager of law*, is not in force in this State.

NEWBERN, *September Term*, 1796.

MOORE v. ISLAR.—Page 78.

The Court, WILLIAMS, J. and M'Coy, J. held in this case: 1. That Sheriffs in no instance, are entitled to costs for services, other than what shall appear of record, by the return of precepts, to them directed.

2. That witnesses who do not attend to the direction of the law, in procuring and filing tickets of their attendance, shall not afterwards be permitted to draw up accounts, and prove them out of Court and thereby entitle themselves to have them taxed in the bill of costs.

NOTE.—Upon the second point see 1 Rev. Stat. ch. 31, sec. 76. *Anonymous*, 2 Hay. Rep., 138. *Standley* v. *Hodges*, Conf. Rep., 330. *Thompson* v. *Hodges*, 3 Hawks, 318.

MARTIN'S REPORTS.

VOL. II.

HAMILTON v. EATON.—Page 1.

Debts contracted with an alien are not extinguished by a war with his nation.

Debts due to British subjects paid into the public treasury compulsorily by an act of Assembly, may notwithstanding be recovered of the debtor by the creditor under the provisions of the treaty of peace with Great Britain in 1783.

The confiscation acts, so far as they interfere with the treaty of peace with Great Britain, were annulled by the treaty.

A statute may be annulled by a treaty where there is an interference, the treaty being the last expression of the public will.

Besides, the treaty of 1783, was declared by an act of Assembly of this State passed in 1787, to be law in this State, and this State by adopting the Constitution of the United States in 1789, declared the treaty to be the Supreme law of the land.

DECLARATION.

U. S. Southern Circuit, } { Circuit Court,
N. Carolina District. } { June Term, 1792.

Archibald Hamilton and John Hamilton, merchants, of Great Britain, and copartners in trade, under the firm of Archibald Hamilton and company, complain of John Eaton, surviving obligor of Gabriel Long, dec'd, citizen of and resident within the State and district of North Carolina, and within the jurisdiction of this honorable court, in custody of the Marshal of the said district, &c., of a plea that he render to them, eight hundred pounds, proclamation money, of the value of 2,000 dollars, money of the United States, which to them he owes, and from them unjustly detains: for that, whereas the said defendant, on the eleventh day of August, in the year 1777, at the county of

Halifax aforesaid, in the province and district aforesaid, one of the United States of America, in the southern circuit, and now within the jurisdiction of this honorable court, made his certain writing obligatory, sealed with his seal and to the court shewn here thereon, and the date whereof is on the same day and year aforesaid, whereby the said defendant did bind and oblige himself to pay to them, the said Archibald and John, the aforesaid sum of 800 pounds of the value aforesaid, whenever afterwards he should be thereto required.

Nevertheless the said defendant did not, nor hath not paid to them, the said Archibald and John, the aforesaid sum of eight hundred pounds of the value aforesaid, although often required, and particularly on the tenth day of May, in the year 1789, at the county aforesaid, within the State and district aforesaid, and within the jurisdiction of this honorable court, but the same to them to pay, has hitherto altogether refused and still does refuse to pay, and detain the same to the damage of the said plaintiffs five hundred dollars, and therefore they bring suit, &c.

W. R. DAVIE, *pro Quær.*

John Doe *and* Richard Roe, *pledges.*

PLEAS IN BAR.

I. And the said John Eaton, by John Haywood, his attorney, comes and defends the force and injury, when, &c., and craves oyer of the writing obligatory aforesaid: and it is read to him in these words, to-wit:

Know all men by these presents, that we, John Eaton and Gabriel Long of the county of Halifax and province of North Carolina, are held and firmly bound unto Archibald Hamilton & Co. of the county and province aforesaid, in the just and full sum of eight hundred pounds, proclamation money, to be paid unto the said Archibald Hamilton & Co., their certain attorney, their heirs, executors, administrators, or assigns: To which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, firmly by these presents, sealed with our seals, and dated this eleventh day of August, Anno Dom. 1777.

And he likewise craves oyer of the condition of the said writing obligatory, and it is read to him in these words, to-wit:

The condition of the above obligation is such, that if the above bound John Eaton and Gabriel Long do and shall well and truly pay, or cause to be paid, unto the said Archibald Hamilton & Co. their certain attorney, their executors, administrators, or assigns, the just sum of four hundred pounds like money, on or before the first day of August next, with lawful interest from the date, then the above obligation to be void: or else to remain in full force and virtue.

Which being read and heard, the said John Eaton saith, that the said plaintiffs ought not to have or maintain their said action against him, because he saith, that on the 4th day of July in the year of our Lord, 1776, and from thence continually afterwards unto the thirtieth day of November, in the year of our Lord, 1782, there was an open war between the king of Great Britain and the United States of America, and that on the said fourth day of July, in the said year of our Lord, 1776, the aforesaid plaintiffs, and each of them were residents and inhabitants of this State, and continued to reside and inhabit within the same, until the twentieth day of October, in the year of our Lord, 1777; on which said twentieth day of October, the said plaintiffs withdrew themselves, and each of them withdrew himself, from this State, and from the United States of America, to-wit, at the county of Halifax in this State; and continually afterwards, from the day last aforesaid, until the termination of said war, the said plaintiffs and each of them, resided beyond the limits of the said United States, under the sovereignty and jurisdiction of the said king, owning and acknowledging their allegiance to him, and during all the time last aforesaid the said plaintiffs or either of them, did not return into this State to be admitted as a citizen or citizens thereof; and that during the time of the said war, between the said king of Great Britain and the said United States of America, by a certain act of the General Assembly, held at Halifax, on the 18th day of Oct. in the year of our Lord, 1779, entitled

"an act to carry into effect an act passed at Newbern in the year 1777, entitled an act for confiscating the property of all such persons as are inimical to this or the United States, and of such persons as shall not within a certain time therein mentioned, appear and submit to the State, whether they shall be received as citizens thereof, and of such persons as shall so appear, and shall not be admitted as citizens, and for other purposes therein mentioned," reciting that whereas it is enacted by the aforesaid act passed at Newbern, in November, one thousand seven hundred and seventy-seven, that all the lands, tenements and hereditaments, and movable property within this State, and all and every right, title and interest therein of which any person was seized or possessed, or to which any person had title, on the 4th day of July, in the year 1776, who, on the said day was absent from this State, and every part of the United States, or who has withdrawn himself from this or any of the United States, after the day aforesaid, and still resides beyond the limits of the United States, shall and are hereby declared to be confiscated to the use of this State, unless such person shall, at the next General Assembly, which should be held after the first day of November, in the year 1777, appear and be admitted to the privilege of a citizen of this State, and restored to the possession or property which to him once belonged within the same; and whereas divers persons who come within the descriptions of the aforesaid recited act, had failed or neglected to appear before the said General Assembly as last mentioned, or at any General Assembly since, and submit to the State whether they should be admitted as citizens thereof, and restored to the possessions which to them once belonged, whereby such certain persons therein after mentioned had clearly incurred and become liable to the penalties of the aforesaid first recited act: in consideration thereof, by the authority of the same General Assembly, it was therein enacted, that all the lands, tenements, hereditaments and personal property within this State, of divers persons therein particularly named, and amongst others of John Hamilton and Archibald Hamilton, by the names of John Hamil-

ton and Archibald Hamilton, late of Halifax, and of all others coming within the meaning of the said confiscation act, and of that act passed at Halifax, and all and every the right, title and interest, which all, or each of the persons aforesaid may have had therein, on the said fourth day of July, in the year 1776, or at any time since should be, and were thereby declared to be confiscated fully and absolutely forfeited to this State, and should be vested in the hands of commissioners as in the said act directed to be appointed for the purposes therein after mentioned. And by the authority of the same General Assembly, it was further therein enacted that commissioners should be appointed by the County Court in each county, who in their respective counties should have full power and authority, to take possession of all lands, tenements, hereditaments, monies, debts, whether due by judgment, bond, bill, note, account, or otherwise, and all other personal property of the persons aforesaid, in the name and for the use of the State, which thereby were declared to be forfeited to the said State, and give receipts and discharges which should forever indemnify all persons delivering or paying the same, their heirs, executors or administrators, against any future claim, for the articles or money, mentioned in such receipts or discharges. And by the authority of the same General Assembly, it was therein further enacted, that the said commissioners might order the several constables to summon any of the inhabitants in their respective counties to appear before them, at convenient times and places, to render on oath an account of such forfeited property, and that they, or a majority of them being present, should administer on oath or affirmation to the inhabitants so appearing, whereby each inhabitant, rendering an account, should swear or affirm that the account by him rendered contained a true and full account to the best of his knowledge, of all the lands, tenements, hereditaments, debts, monies, and all personal property in the county or elsewhere, which belonged on the fourth day of July in the year of our Lord 1776, to any of the (therein) before mentioned person or persons, or at any time since, who came within, or are included by the descriptions, or either of them recited in the said act

or the confiscation act, passed at Newbern, in the year 1777, and that he had not disposed or parted with the same, or any part thereof, to elude or evade the intent and meaning of the confiscation act, or of that act passed at Halifax, and further that the said account contained, to the best of his recollection, the full amount of all and every sum and sums of money which then were by him due, and owing to any such person or persons, including interest, if any due, by bond, note or account, or by virtue of any trust whatever; and if any person summoned as aforesaid, should fail to appear, or appearing, should fail to render an account as above mentioned, on oath or affirmation, as the case might be, in such case the said commissioners, or a majority of them, should have power to commit such person, if present, to close gaol until he or she should comply with the law; and if absent, should issue a warrant, directed to any sheriff or constable, to apprehend and bring such absent person before them, at any place, on a future day, when, if he or she should refuse to render an account on oath or affirmation as aforesaid, he or she should also be committed to close gaol, until he or she should render an account on oath as aforesaid; and the said commissioners were thereby invested with power to administer the oath, issue warrants and make commitments, in manner aforesaid. And the said commissioners were thereby invested with full power and authority to demand, make distress for, and receive all sums of money due and owing by the inhabitants of their respective counties, and declared forfeited by the said act, and were thereby made liable to account for the same to the public treasurers of this State. And the said John Eaton further saith, that on the day of the making of the aforesaid act, passed at Halifax, and also from the day of the date of the said writing obligatory, and from thence continually afterwards, until this present day, he the said John, hath been an inhabitant of the said State, being and residing within the same, to-wit, at the county of Halifax aforesaid, and that after the making of the aforesaid act passed at Halifax, the Court of Pleas and Quarter Sessions for the said county, held for the said county, at the town of Halifax, in the said county, on the — day

of ———, in the year of our Lord 1780, duly appointed Samuel Weldon, William Wooting and William Montfort, to be commissioners for the purposes aforesaid, in the said act expressed, for the said county of Halifax, who then and there accepted the appointment, and having duly qualified themselves for the same, by performing and complying with the several requisities by law prescribed in such case, then and there took upon themselves the exercise thereof: and that the said commissioners, after their appointment and qualification as aforesaid, caused the said John Eaton to be summoned according to the directions of the aforesaid act, to appear before them on the fifteenth day of April, in the year of our Lord 1780, in the county aforesaid, to give in on oath, an account, among other things, of all and every the sum and sums of money as aforesaid, by him due and owing to the persons aforesaid; whereupon the said John Eaton, then and there appeared before the said commissioners and rendered to them, on oath, an account of the sum of £460, being the principal and interest then due, in the said writing obligatory above specified, and that afterwards, to-wit, on the same day and year last aforesaid, in the county aforesaid, that he, the said John Eaton, by the commissioners aforesaid was required to pay them the said sum of four hundred and sixty pounds, according to the directions and intent of the act aforesaid; and that he the said John Eaton thereupon, then and there, paid to the said commissioners the aforesaid sum of £460, being the whole sum mentioned in the condition aforesaid, and all the interest therefore then due: and that thereupon the said commissioners, then and there, made and delivered to him the said John Eaton, a receipt and discharge of and for the sum aforesaid, by him paid as aforesaid, according to directions of the act aforesaid: and this he is ready to verify. Wherefore he prays judgment, whether the said plaintiffs ought to have or maintain their said action against him; together with this, that he is ready to verify that the said John Hamilton and Archibald Hamilton, above named in the said declaration, and the said John Hamilton and Archibald Hamilton, in

the aforesaid act of the said General Assembly likewise named, are the same and not different persons.

II. And the said John Eaton further saith, that the said John Hamilton and Archibald Hamilton ought not to have and maintain their said action against him, because he saith that on the fourth day of July, in the year of our Lord 1776, and continually afterwards, until the third day of September in the year of our Lord 1782, a war was prosecuted and carried on against the United States of America by the king of Great Britain; and that in the time of the continuance thereof, by a certain act of the General Assembly of the State of North Carolina, held at Newbern, on the fifteenth day of November, in the year of our Lord 1777, it was amongst other things enacted by the authority of the same General Assembly, that all the lands, tenements, hereditaments and movable property, within this said State, and all and every right, title and interest therein, of which any person was seized, or to which any person had title on the fourth day of July, in the year of our Lord 1776, who, on the aforesaid day, was absent from the said State and every part of the United States, and who then was still absent from the same, and then at any time during the war had attached himself to, or aided or abetted, the enemies of the said United States; or who then had withdrawn himself from the said State, or any of the United States, and who then resided beyond the limits of the said United States, should be and are thereby declared to be confiscated to the use of the said State, unless such persons should, at the next General Assembly, which should be held after the first day of October in the year 1778, appear and be by the said Assembly admitted to the privilege of a citizen of this said State, and restored to the possession and property which to him once belonged within the same. And the said John Eaton further saith, that afterwards, by one other act of the General Assembly of this State aforesaid, held at Halifax on the eighteenth day of October, in the year of our Lord 1779, reciting the act last aforesaid, and that whereas divers persons, who come within the description of the aforesaid recited act, had failed or neglected to appear before the said

General Assembly as therein mentioned, or at any General Assembly (then) since, and submit to the State whether they should be admitted as citizens thereof, and restored to the possessions which to them once belonged, whereby such certain persons in the said last mentioned act therein after mentioned, had clearly incurred and became liable to the penalties of the aforesaid first recited act, in consideration thereof, it was enacted by the authority of the same General Assembly, held at Halifax as aforesaid, amongst other things, that all the lands, tenements, hereditaments and personal property within the said State, of divers persons in the said last mentioned act named, and amongst others, of John Hamilton and Archibald Hamilton, then late of Halifax, and of all others who then came within the meaning of the aforesaid act first above mentioned, and of the said last mentioned act, and all and every the right, title and interest, which all or each of the persons aforesaid may have had therein, on the said fourth day of July, 1776, or at any time (then) since, should be, and thereby are declared to be confiscated, fully and absolutely forfeited to the said State, and should be vested in the hands of commissioners as therein directed to be appointed for the purpose thereinafter mentioned: and it was thereby further enacted, that commissioners should be appointed by the County Court in each county, who should have full power and authority to take possession of all lands, tenements, hereditaments, monies, debts, whether due by judgment, bond, bill, note, account or otherwise, and other personal property of the persons aforesaid, in the name and for the use of the said State, which by the said act were declared to be forfeited to the said State, and should give receipts and discharges which should forever indemnify and acquit the persons delivering or paying the same, their heirs, executors, and administrators, against any further claim for the articles or money mentioned in such receipts or discharges. And the said John Eaton further saith, that in the time when the said war was yet continuing, and upon the said fourth day of July, in the year of our Lord, 1776, and continually afterwards, until the time

of their departure from this State, herein after mentioned, the said plaintiffs, in the said declaration named, were residents, and each of them was a resident, inhabiting and residing within the limits of the said State of North Carolina, to-wit, in the county of Halifax, and that they, the said plaintiffs, whilst the said war was yet continuing, and after the said fourth day of July, in the year of our Lord 1776, and before the making of the said acts herein before mentioned, or either of them, that is to say on the first day of September, in the year of our Lord 1777, at the county of Halifax aforesaid, did withdraw themselves, and each of them did withdraw himself from this said State, and that they, the said plaintiffs, and each of them, at the time of the making of the said first mentioned act, and also at the time of the said last mentioned act, and each of them, resided beyond the limits of the United States of America, and that they, the said plaintiffs, or either of them, at the time of the making of the aforesaid last mentioned act, had not, nor had either of them, appeared before any General Assembly of the said State, to be admitted a citizen or citizens thereof, and to be restored to the possession and property which to them once belonged within the same; nor had the said plaintiffs, or either of them, after their departure from this State as aforesaid, ever at any time thereafter, been admitted as citizens thereof, and restored to the possession and property which to them once belonged as aforesaid. And the said John Eaton saith, that at the time of passing the acts herein before mentioned, and each of them, and long before that time, that is to say, from the day of the date of the writing obligatory aforesaid, until the present day, that he, the said John Eaton, hath been continually an inhabitant and resident of this State, dwelling and residing within the same, to-wit, at the county of Halifax aforesaid. And so the said John Eaton saith, that by reason of the premises, and by force of the acts of the General Assembly in such case made and provided, the debt aforesaid in the declaration aforesaid, and in the writing obligatory aforesaid above specified, hath been and is now confiscated and fully and absolutely forfeited to and vested in the said State: and this he is ready to verify.—

Wherefore he prays judgment whether the said John Hamilton and Archibald Hamilton ought to have or maintain their said action against him: together with this, that he the said John Eaton is ready to verify that the said John Hamilton and Archibald Hamilton in the said declaration, and the said John Hamilton and Archibald Hamilton likewise above named herein, and also in the act aforesaid, passed at Halifax, are the same and not different persons.

III. And the said John Eaton, for further plea in bar saith, that by the aforesaid act, passed at Halifax, reciting that whereas many persons, who before that time refused to take the oath of allegiance to the State, and were compelled to leave the same, in consequence thereof, by virtue of an act of Assembly, passed at Newbern, in April, in the year of our Lord, 1777, entitled an act for declaring what crimes and practices against the State shall be treason, and what shall be misprision of treason, and providing punishments adequate to crimes of both classes, and for preventing the dangers which may arise from persons disaffected to the State, and of another act passed at Newbern, in November, in the year 1777, to amend the aforesaid act, had failed or neglected to sell or convey their real estates, agreeable to the said acts, and to appoint lawful agents and attornies to receive and give discharges for debts due and owing by the inhabitants of the said State, to persons who so departed therefrom, whereby many lands of the persons last described, were then yet undisposed of, and still continued to be and remain to the use of the same, and many well meaning people were defeated of an opportunity to discharge such debts due as aforesaid; in consideration thereof, it was enacted, that all such lands of the persons described in these said last recited acts, which had not then been sold and disposed of *bona fide*, for a valuable consideration, actually paid, and all debts, money and personal property belonging to the same, then not yet collected and appropriated, according to the directions of the said acts therein recited, should be, and thereby were declared to be, forfeited to the aforesaid State, and the commissioners aforesaid, were thereby directed to proceed on such real and personal estate, in like manner as on the estate of the

persons therein first mentioned, anything contained in the said recited acts to the contrary notwithstanding. And the said John Eaton further saith, that the said plaintiffs, and each of them, before the making of the said acts, passed at Halifax, had refused, and each of them had refused, to take the oath of allegiance in the said first recited acts prescribed, that is to say, on the —— day of ———, in the year of our Lord, 1777, in the State aforesaid, at the county of Halifax; and that therefore, they the said plaintiffs were compelled, and each of them was compelled, to leave the said State, by virtue of, and in pursuance of the first of the said recited acts; that is to say, at the county of Halifax aforesaid; and that they the said plaintiffs at the time of the making of the said act, passed at Halifax, had not appointed any lawful agents or attornies, to receive and give discharges for the debts due and owing to them, from the inhabitants of the State aforesaid. And the said John Eaton further saith, that he the said John Eaton, at the time of the making of the aforesaid act, passed at Halifax, and continually before that time, from the day of the date of the writing obligatory aforesaid, had been an inhabitant of the aforesaid State, living and residing within the same, to-wit, at the county of Halifax aforesaid. And so the said John Eaton saith, that by means of the premises, and by force of the acts of the General Assembly of the State aforesaid, in such cases made and provided, that the debt aforesaid in the declaration aforesaid, by the said John and Archibald Hamilton demanded of him was, and is, confiscated and fully and absolutely forfeited to the aforesaid State of North Carolina, and this he is ready to verify.—Wherefere he prays judgment whether the said John Hamilton and Archibald Hamilton, ought to have or maintain their said action against him.

IV. And the said John Eaton, for further plea in bar saith that by the aforesaid act, passed at Halifax, reciting that whereas many persons who, before that time, refused to take the oath of allegiance to this State, and were compelled to leave the same, in consequence thereof, by virtue of an act of Assembly passed at Newbern, in April, in the year of our Lord, 1777, entitled an act for declaring what crimes and

practices against the State shall be treason, and what misprision of treason, and providing punishment adequate to crimes of both classes, and for preventing the dangers which may arise from persons disaffected to the State; and of another act, passed at Newbern, in November, in the year 1777, to amend the aforesaid act, had failed, or neglected, to sell or convey their real estates, agreeable to the said acts, and to appoint lawful agents and attornies to receive and give discharges, for debts due and owing by the inhabitants of the said State, to persons who so departed therefrom, whereby many lands of the persons last described were then yet undisposed of, and still continued to be and remain to the use of the same, and many well meaning people were defeated of an opportunity to discharge such debts due as aforesaid; in consideration thereof, it was enacted that all such lands of the persons described in these said last mentioned acts which had not then been sold and disposed of *bona fide* for a valuable consideration actually paid, and all debts, money and personal property belonging to the same, then not yet collected and appropriated, according to the directions of the said acts therein recited, should be and thereby were declared to be forfeited to the aforesaid State, and the commissioners aforesaid, were thereby directed to proceed on such real and personal estate, in like manner, as on the estate of the persons therein first mentioned; anything contained in the said recited acts to the contrary notwithstanding. And the said John Eaton further saith, that the said plaintiffs, and each of them, before the making of the said acts, passed at Halifax, had refused and each of them had refused to take the oath of allegiance, in the said first recited acts prescribed, that is to say, on the — day of ——, in the year of our Lord, 1777, in the State aforesaid, at the county of Halifax, and that therefore they the said plaintiffs were compelled, and each of them was compelled to leave the said State, by virtue of and in pursuance of the first of the said recited acts, that is to say, at the county of Halifax aforesaid, and that they the said plaintiffs, at the time of the making of the said act passed at Halifax, had not appointed any lawful agents or attornies, to receive and give discharges, for the debts

due and owing to them from the inhabitants of the State aforesaid: and the said John Eaton further saith, that he the said John Eaton, at the time of the making of the aforesaid act, passed at Halifax, and continually before that time, from the day of the date of the writing obligatory aforesaid, had been an inhabitant of the aforesaid State, living and residing within the same, to-wit, at the county of Halifax aforesaid. And so the said John Eaton saith, that by means of the premises and by force of the acts of the General Assembly of the State aforesaid, in such cases made and provided, that the debt aforesaid, in the declaration aforesaid, by the said John Hamilton and Archibald Hamilton demanded of him, was, and is confiscated, and fully and absolutely forfeited, to the aforesaid State of North Carolina: and this he is ready to verify. Wherefore he prays judgment, whether the said John Hamilton and Archibald Hamilton ought to have or maintain their said action against him.

JOHN HAYWOOD, *pro. Def.*

REPLICATIONS.

I. And the said Archibald and John Hamilton, as to the plea of the said John Eaton by him first above pleaded in bar; say that they, by reason of anything in that plea alleged, ought not to be barred from having or maintaining their said action thereof against him. Because, protesting that, that plea and the matters therein contained are not sufficient in law to bar the said Archibald and John Hamilton from having or maintaining their said action against the said John Eaton for replication, they the said Archibald and John Hamilton, say that true it is, that on the said fourth day of July, in the said year, 1776, and from thence continually afterwards, until the said thirtieth day of November, in the said year, 1782, there was an open war between the said king of Great Britain and the United States of America aforesaid, and that on the said fourth day of July, in the said year, 1776, the said Archibald and John Hamilton were residents and inhabitants, and each of them was a resident and inhabitant of this State, and continued to reside and inhabit within the same

until the said twentieth day of October, in the year 1777, aforesaid. Yet the said Archibald and John Hamilton further say, that by an act made and provided in a General Assembly of the State of North Carolina, begun and held at Newbern aforesaid, in the said State of North Carolina, and now in the district of North Carolina, and within the jurisdiction of this court, after the said fourth day of July in the year 1776 aforesaid, and before the time of making the said writing obligatory, to-wit, on the eighth day of April in the year 1777 aforesaid, entitled "an act declaring what crimes and practices against the State shall be treason, and what shall be misprision of treason and providing punishments adequate to crimes of both classes, and for preventing the dangers which may arise from persons disaffected to the State," (among other things) it is enacted, by the authority of the same General Assembly, that all the then late officers of the king of Great Britain, and all persons (quakers excepted) being subjects of the said State, and then living therein, or who should thereafter come to live therein, who had traded immediately to Great Britain or Ireland, within ten years then last passed, in their own right, or acted as storekeepers, factors or agents here, or in any of the United States of America, for merchants residing in Great Britain or Ireland, should take a certain oath of abjuration and allegiance therein mentioned, or depart out of the said State; and it is by the same act provided that all and every such person and persons, should have liberty, and that they might also nominate and appoint an attorney or attornies, to sell and dispose of his or their estate for his or their own use and benefit, as by the same act (among other things) may more fully appear. And the said Archibald and John Hamilton further say that they, on the said eighth day of April, in the year 1777 aforesaid, and long before then, were, and from the time of their nativities respectively continually hitherto have been, and still are, subjects of and owing allegiance to, the said king of Great Britain; and that they, the said Archibald and John Hamilton, on the same day and year last aforesaid, and for a long time, to-wit, the space of ten years before the making of the same, and until the said twentieth day of October in the

said year 1777, were merchants and copartners, living in the then State, and formerly province of North Carolina aforesaid, and had within, and during the said space of ten years last past, before the making of the same act, traded immediately to Great Britain, to-wit, at ——— in their own right, that is to say, at the State of North Carolina aforesaid, and now in the district of North Carolina aforesaid, and within the jurisdiction of this court. And after the said eighth day of April, in the year 1777 aforesaid, and before the said twentieth day of October, in the said year 1777, to-wit, on the same — day of ——— in the said year 1777, at North Carolina aforesaid, now in the said district of North Carolina and within the jurisdiction of this court, the said John Eaton made his said writing obligatory in the said declaration mentioned, and by the same writing obligatory he the said John Eaton, then and there *bona fide* contracted the said debt in the said declaration mentioned. And the said Archibald and John Hamilton further say, that after the said eighth day of April, in the said year 1777, and after the making of the said writing obligatory, to-wit, on the said twentieth day of October, in the year 1777 aforesaid, they the said Archibald and John Hamilton, then being merchants and copartners as aforesaid, and having lived, resided and inhabited, and then living, residing and inhabiting in the State of North Carolina aforesaid, in the manner herein before mentioned, and having traded immediately to Great Britain aforesaid, within and during ten years last past before the making of the same act as aforesaid, and then being the subjects of, and owing allegiance to the said king of Great Britain as aforesaid. And the said John Eaton having contracted the said debt *bona fide* with the said Archibald and John Hamilton aforesaid; and the said Archibald and John Hamilton, being creditors in that respect as aforesaid, did withdraw themselves from the said State, and from the United States of America aforesaid, and they, and each of them did remove and depart out of the said State, to-wit, to Europe, in conformity to the tenor, true intent and meaning of, and in obedience to, the same last mentioned act of

the General Assembly; and continually afterwards from the said twentieth day of October, in the said year 1777, until the termination of the said war, the said Archibald and John Hamilton resided beyond the limits of the said United States, under the sovereignty and jurisdiction of the said King, owing and acknowledging their allegiance to him; and during all the time last aforesaid, they the said Archibald and John Hamilton did not, nor did either of them, return unto the said State to be admitted as citizens or a citizen thereof. And the said Archibald and John Hamilton further say, that afterwards such act of the General Assembly held at Halifax, on the eighteenth day of October, in the year 1779 aforesaid, entitled "an act to carry into effect an act passed at Newbern in the year 1777, entitled an act for confiscating the property of all such persons as are inimical to this or the United States, and of such persons as shall not within a certain time therein mentioned appear and submit to the State whether they shall be received as citizens thereof, and of such persons as shall so appear and shall not be admitted as citizens, and for other purposes therein mentioned, and for other purposes," was made as in the same plea alleged, and that on the day of the making of the aforesaid act at Halifax, and also from the day of the date of the said writing obligatory and from thence continually afterwards, until the day of pleading the same plea in bar, the said John Eaton hath been an inhabitant of the said State, being and residing within the same, to-wit, at the county of Halifax aforesaid, and that after the making of the said act passed at Halifax, the Court of Pleas and Quarter Sessions for the said county, held for the said county, at the town of Halifax in the said county, on the — day of —— in the said year 1780, duly appointed the said Samuel Weldon, William Wooting and William Montfort, to be commissioners for the purpose aforesaid, in the said act expressed, for the said county of Halifax, who then and there accepted the said appointment, and having duly qualified themselves for the same, by performing and complying with the several requisites by law prescribed in

such case, then and there took upon themselves the exercise thereof; and that the said commissioners, after their said appointments and qualifications aforesaid, caused the said John Eaton to be summoned, according to the directions of the aforesaid act, in the same plea in bar mentioned, to appear before them, on the said fifteenth day of April, in the said year 1780, in the county aforesaid, to give in on oath an account (amongst other things) of all and every the sum and sums of money aforesaid, by him due and owing to the persons aforesaid: whereupon the said John Eaton then and there appeared before the said commissioners, and rendered to them on oath an account of the sum of four hundred and sixty pounds, being the principal and interest then due on the said writing obligatory above specified; and that afterwards, to-wit, on the same day and year last aforesaid, in the county aforesaid, he, the said John Eaton, by the commissioners aforesaid was required to pay them the said sum of £460, according to the directions and intent of the act aforesaid in the same plea in bar mentioned: and that he the said John Eaton thereupon then and there paid to the said commissioners the aforesaid sum of four hundred and sixty pounds, being the whole sum mentioned in the condition aforesaid, and all the interest thereupon then due: and that thereupon the said commissioners, then and there made and delivered to him the said John Eaton a receipt and discharge of and for the sum aforesaid by him paid as aforesaid, according to the direction of the act aforesaid in the same plea in bar mentioned. Yet the said Archibald and John Hamilton further say, that by the definitive treaty of peace between the United States of America aforesaid and his Britannic Majesty aforesaid, made and done at Paris, after the said fourth day of July, in the said year 1776, and after the time of making of the said writing obligatory, and after the departure of the said Archibald and John Hamilton, in conformity and obedience to the act of the General Assembly herein before pleaded, and after the passing of the said act of the said General Assembly in the same plea in bar pleaded, to-wit, on the third day of September, in the year of our Lord 1783, it is (among other things,) stipulated

and agreed that creditors on either sides should meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bona fide* debts theretofore contracted, as by the same treaty, (among other things) may more fully appear. And the said Archibald and John Hamilton further in fact say, that they at the time of the making of the said definitive treaty, and for a long time before then, to-wit, on the said — day of —— in the said year 1777, were, and from that same day continually hitherto have been, and still are, creditors of the said John Eaton, by virtue of the writing obligatory in the said declaration mentioned, in manner and form as therein is declared, and on the side of his said Britannic Majesty, within the true intent and meaning of the said definitive treaty, (that is to say,) at the State of North Carolina aforesaid, now in the district of North Carolina, and within the jurisdiction of this court, and that they, the said Archibald and John Hamilton, at the time of the making of the said definitive treaty, at and before the passing of the said act of the General Assembly in the same plea in bar pleaded, and at and before the departing of the said Archibald and John Hamilton, in conformity to the act of the General Assembly herein before pleaded, by way of reply, and at and before the time of the making of the said writing obligatory in the said declaration mentioned, and at and before the time of the making of the said act herein before pleaded, by way of reply, and on the said fourth day of July in the said year 1776, and long before, then and from the times of their nativities respectively, were, and from thence continually hitherto have been, and still are, subjects of his said Britannic Majesty, owing and acknowledging their allegiance and obedience to him. And that the said debt, in the said declaration mentioned was contracted, and the said writing obligatory therein also mentioned made and executed by the said John Eaton, *bona fide*, before the time of the making of the said definitive treaty, (to-wit,) on the said — day of ——, in the said year 1777, and the same debt still remains wholly due and owing from the said John Eaton to the said Archibald and John Hamilton, and

hath not, nor hath any part thereof, been paid or satisfied to them, or either of them, (that is to say,) at the State of North Carolina aforesaid, and in the said district of North Carolina, and within the jurisdiction of this court. And the said Archibald and John Hamilton further say, that by the constitution ordained and established by the people of the United States, for the United States of America, done in convention after the said third day of September, in the said year 1783, (to-wit,) on the seventeenth day of September in the year of our Lord 1787, it is (among other things) expressly declared that all treaties which were then made, or which should be made under the authority of the United States, should be the Supreme law of the land, anything in the said constitution or laws of any State to the contrary notwithstanding, as by the same constitution more fully appears. And the said Archibald and John Hamilton, further say that, by an act made and provided in a General Assembly of the State of North Carolina begun and held at Tarborough, now in the district of North Carolina aforesaid, and within the jurisdiction of this court, after the said third day of September, in the said year one thousand seven hundred and eighty-three, and after the said seventeenth day of September in the said year 1787, (to-wit,) on the eighteenth day of November, in the year of our Lord 1787, and in the twelfth year of the independence of the said State, entitled an act declaring the treaty of peace between the United States of America and the king of Great Britain to be part of the law of the land, it is enacted by the authority of the same General Assembly, that the articles of the definitive treaty between the United States of America and the king of Great Britain, were thereby declared to be part of the law of the land. And it was also thereby further enacted by the same authority, that the courts of law and equity were thereby declared in all cases and questions cognizable by them, respecting the said treaty, to judge accordingly; as by the same act more fully appears. Wherefore, for that the said Archibald and John Hamilton were merchants, and were and are subjects of the said king of Great Britain, and creditors on his side as afore-

said; and the said debt was *bona fide* contracted before the making of the said definitive treaty, and the ordaining and establishing of the said constitution, and the passing of the said act declaring the said definitive treaty to be part of the law of the land; they, the said Archibald and John Hamilton, pray judgment and their said debt, together with their damages, occasioned by the detaining of the same, to be adjudged to them, &c.

II. And the said Archibald and John Hamilton, as to the said plea of the said John Eaton, by him secondly above pleaded in bar, say that they, by reason of anything in that same plea alleged, ought not to be barred from having or maintaining their said action thereof against him; because, protesting that, that same plea and the matters therein contained are not sufficient in law to bar the said Archibald and John Hamilton from having or maintaining their said action against the said John Eaton; for replication they, the said Archibald and John Hamilton, say that true it is that on the said fourth day of July, in the year 1776, and continually afterwards, until the said third day of September, in the said year 1782, a war was prosecuted and carried on against the United States of America by the king of Great Britain: and that, in the time of the continuance thereof, such act was made and passed by and at a General Assembly of the State of North Carolina, held at Newbern aforesaid, on the said fifteenth day of November, in the year 1777 aforesaid, as in the same plea in bar that behalf is alleged; and that afterwards the said other act was made and passed by and at the General Assembly of North Carolina, held at Halifax aforesaid, on the said eighteenth day of October in the year 1779 aforesaid, as in the same plea in bar in that behalf is also alleged; and that in the time when the said war was continuing, and upon the said fourth day of July, in the said year 1776, and continually afterwards, until the time of the departure of the said Archibald and John Hamilton from the said State herein after mentioned, they, the said Archibald and John Hamilton were residents, and each of them was a resident, inhabiting and residing within the limits of the

said State, (to-wit,) in the county of Halifax, and that the said John Eaton, at the times of the passing the acts in the same plea in bar mentioned, and each of them, and long before that time, (to-wit,) from the day of the date of the said writing obligatory, until the day of pleading the same plea in bar, hath been continually an inhabitant and resident of this State, dwelling and residing within the same, (to-wit,) at the county of Halifax aforesaid. Yet the said Archibald and John Hamilton further say, that by an act made and provided in a General Assembly of the State of North Carolina, begun and held at Newbern aforesaid, in the said State of North Carolina, and now in the district of North Carolina, and within the jurisdiction of this court, whilst the war was continuing, and after the said fourth day of July, in the year 1776 aforesaid, and before the said eighteenth day of October, in the said year 1779, and before the said fifteenth day of November, in the said year 1777, and before the time of the making of the said writing obligatory, (to-wit,) on the eighth day of April, in the said year 1777, entitled an act declaring what crimes and practices against the State shall be treason and what shall be misprision of treason, and providing punishments adequate to crimes of both classes, and for preventing the dangers which may arise from persons disaffected to the State, (among other things) it is enacted by the authority of the same General Assembly, that all the then late officers of the king of Great Britain, and all persons (quakers excepted) being subjects of the said State, then living therein, or who should thereafter come to live therein, who had traded immediately to Great Britain or Ireland, within ten years then last past, in their own right, or acted as factors, storekeepers or agents here, or in any of the United States of America, for merchants residing in Great Britain or Ireland, should take a certain oath of abjuration and allegiance therein mentioned, or depart out of the said State. And it is by the same act provided, that all and every such person and persons should have liberty, and that they might also nominate and appoint an attorney or attornies, to sell and dispose of his or their estate

for his or their use and benefit, as by the same act (among other things) may more fully appear. And the said Archibald and John Hamilton further say, that they, on the said eighth day of April, in the year one thousand seven hundred and seventy-seven aforesaid, and long before then, were, and from the time of their nativities respectively, continually hitherto have been, and still are, subjects of, and owing allegiance to, the said king of Great Britain. And that they, on the same day and year last aforesaid, and for a long time, to-wit, for the space of ten years before themaking of the same act last mentioned, and until the said first day of September, in the said year one thousand seven hundred and seventy-seven, were merchants and copartners, living in the then State, and formerly province of North Carolina aforesaid, and had within and during the said space of ten years last past, before the making of the same last mentioned act, traded immediately to Great Britain, in their own right, that is to say, at the State of North Carolina aforesaid, and now in the district of North Carolina aforesaid, and within the jurisdiction of this court; and after the said eighth day of April, in the said year 1777, and before the said first day of September in the same year, to-wit, on the said — day of ——— in the same year, at North Carolina aforesaid, and now in the district of North Carolina aforesaid, and within the jurisdiction of this court, he the said John Eaton made his said writing obligatory, sealed with the seal of the said John Eaton, and the date whereof is the same day and year; and by the same writing, he the said John Eaton then and there *bona fide* contracted the said debt, in the said declaration mentioned. And the said Archibald and John Hamilton further say, that whilst the said war was continuing, and after the said fourth day of July, in the said year 1776, and after the said eighth day of April, in the said year 1777, and after the making of the said writing obligatory, and before the said fifteenth day of October, in the said year 1779, and before the said fifteenth day of November, in the said year 1777, to-wit, on the said first day of September, in the said year 1777, they the said Archibald and John Hamilton, then being mer-

chants and copartners as aforesaid, and having lived, resided and inhabited, and then living, residing and inhabiting in North Carolina aforesaid, in the manner herein before alleged, and having traded immediately to Great Britain aforesaid, within and during ten years last past, before the making of the same last mentioned act as herein before alleged, and then being the subjects of, and owning and acknowledging allegiance to, the said king of Great Britain as aforesaid, and the said John Eaton having contracted the said debt *bona fide* with the said Archibald and John Hamilton as aforesaid, and the said Archibald and John Hamilton being creditors in that respect as aforesaid, did withdraw themselves, and each of them did withdraw himself from the said State, and remove and depart out of the said State, to-wit, to Europe, in conformity to the tenor, true intent and meaning of, and in obedience to, the same last mentioned act of the General Assembly; and continually afterwards, from the said first day of September, in the said year 1777, and at the time of making of the said act, in the same plea secondly above pleaded in bar first mentioned, and also at the time of making of the said in act in the same plea secondly above pleaded in bar last mentioned, and at the respective times of the making of each of them, they the said Archibald and John Hamilton resided beyond the limits of the United States of America, under the sovereignty and jurisdiction of the said king, owing and acknowledging their allegiance to him, and they the said Archibald and John Hamilton had not, nor had either of them, at the time of the making the said act in the same plea secondly above pleaded in bar last mentioned, appeared before any General Assembly of the said State, to be, nor had they or either of them after their departure from the said State as aforesaid ever at any time after, been admitted a citizen or citizens thereof. And they the said Archibald and John Hamilton further say, that by the definitive treaty of peace between the United States of America aforesaid and his Britannic Majesty aforesaid, made and done at Paris, after the said fourth day of July, in the year 1776, and after the time of the making of the said writing obligatory, and

after the departure of the said Archibald and John Hamilton, in conformity and obedience to the act of the General Assembly herein before pleaded, and after the passing of the act of the General Assembly in the same plea in bar secondly above pleaded first mentioned, and after the passing of the act of the General Assembly in the same plea in bar secondly above pleaded last mentioned, to-wit, on the third day of September, in the year of our Lord one thousand seven hundred and eighty-three, it is (among other things) stipulated and agreed, that creditors on either side should meet with no lawful impediment to the recovery of the full value in sterling money of all *bona fide* debts theretofore contracted, as by the same treaty (among other things) may more fully appear. And the said Archibald and John Hamilton further in fact say, that they, at the time of the making of the said definitive treaty, and for a long time before then, to-wit, on the said — day of ——, in the said year 1777, were, and from that same day, continually hitherto have been, and still are, creditors of the said John Eaton, by virtue of the said writing obligatory, in the said declaration mentioned, in manner and form as therein is declared; and on the side of his said Britannic Majesty, within the true intent and meaning of the said definitive treaty, that is to say, at the State of North Carolina aforesaid, and now in the said district of North Carolina, and within the jurisdiction of this court; and that they, the said Archibald and John Hamilton, at the time of the making of the said definitive treaty, and at and before the passing of the said act of the General Assembly, in the same plea in bar secondly above pleaded last mentioned, and at and before the passing of the said act of the General Assembly in the said plea in bar secondly above pleaded first mentioned, and at and before the departing of the said Archibald and John Hamilton, in conformity to the said act of the General Assembly herein before pleaded by way of reply, and at and before the time of the making of the said writing obligatory in the said declaration mentioned, and at and before the time of the making of the said act of the General Assembly herein before pleaded by way of

reply, and on the said fourth day of July, in the said year 1776, and long before, then, and from the times of their nativities respectively were, and from thence continually hitherto have been, and still are subjects of his Britannic Majesty, owing and acknowledging their allegiance to him. And that the said debt in the said declaration mentioned was contracted, and the said writing obligatory therein mentioned was executed by the said John Eaton, *bona fide*, before the time of the making of the said definitive treaty, to-wit, on the said — day of —— in the said year 1777, and the same debt still remains wholly due and owing from the said John Eaton to the said Archibald and John Hamilton, and hath not, nor hath any part thereof been paid or satisfied to them, or either of them, that is to say, at the State of North Carolina aforesaid, and now in the said district of North Carolina, and within the jurisdiction of this court. And the said Archibald and John Hamilton further say that by the constitution ordained and established by the people of the United States of America, done in convention after the said third day of September, in the said year 1783, to wit, on the seventeenth day of September in the year of our Lord 1787 it is (among other things,) expressly declared that all treaties which were then made, or which should be made, under the authority of the United States, should be the supreme law of the land, anything in the said constitution or laws or any State to the contrary notwithstanding; as by the same constitution more fully appears. And the said Archibald and John Hamilton further say, that by an act made and provided in a General Assembly of the State of North Carolina begun and held at Tarborough, now in the district of North Carolina aforesaid, and within the jurisdiction of this court, after the said third day of September, in the said year one thousand seven hundred and eighty-three, and after the said seventeenth day of September in the said year 1787, to-wit, on the eighteenth day of November, in the year of our Lord 1787, and in the twelfth year of the independence of the said State, entitled an act declaring the treaty of peace between the United

States of America and the king of Great Britain to be part of the law of the land, it is enacted by the authority of the same General Assembly, that the articles of the definitive treaty between the United States of America and the king of Great Britain, were thereby declared to be part of the law of the land. And it was also thereby further enacted by the same authority, that the courts of law and equity were thereby declared in all cases and questions cognizable by them, respecting the said treaty, to judge accordingly; as by the same act more fully appears. Wherefore, for that the said Archibald and John Hamilton were merchants, and were and are subjects of the said king of Great Britain, and creditors on his side as aforesaid; and the said debt was *bona fide* contracted before the making of the said definitive treaty, and the ordaining and establishing of the said constitution, and the passing of the said act declaring the said definitive treaty to be part of the law of the land: they, the said Archibald and John Hamilton, pray judgment and their said debt, together with their damages, occasioned by the detaining of the same, to be adjudged to them, &c.

III. And the said Archibald and John Hamilton, as to the plea of the said John Eaton by him thirdly above pleaded in bar; say that they, by reason of anything in that plea alleged, ought not to be barred from having or maintaining their said action thereof against him. Because, protesting that, that plea and the matters therein contained are not sufficient in law to bar the said Archibald and John Hamilton from having or maintaining their said action against the said John Eaton, for replication they, the said Archibald and John Hamilton, say that true it is that the said John Eaton, at the time of making of the said act at Halifax in the same plea in bar thirdly above pleaded, and at the time of making of the said act passed at Newbern, in November in the year 1777, and the said act passed at Halifax as aforementioned, and continually before the said times respectively from the day of the date of the writing obligatory aforesaid, was, and had been an inhabitant of the said State, living and residing within the same, (to-wit,) at the county of Halifax

aforesaid. Yet the said Archibald and John Hamilton further say that, by an act made and provided in a General Assembly of the State of North Carolina, begun and held at Newbern aforesaid, in the said State of North Carolina, and now in the district of North Carolina, and within the jurisdiction of this court, after the said fourth day of July, in the year 1776 aforesaid, and before the time of making the said writing obligatory, and before the passing of the said act of the General Assembly at Halifax, on the eighteenth day of October, in the year of our Lord one thousand seven hundred and seventy-nine, in the same plea mentioned, to-wit, on the eighth day of April, in the year 1777 aforesaid, entitled "an act declaring what crimes and practices against the State shall be treason and what shall be misprision of treason, and providing punishments adequate to crimes of both classes, and for preventing the dangers which may arise from persons disaffected to the State," (among other things) it is enacted, by the authority of the same General Assembly, that all the then late officers of the king of Great Britain, and all persons (quakers excepted) being subjects of the said State, and then living therein, or who should thereafter come to live therein, who had traded immediately to Great Britain or Ireland, within ten years then last past, in their own right, or acted as storekeepers, factors or agents here, or in any of the United States of America, for merchants residing in Great Britain or Ireland, should take a certain oath of abjuration and allegiance therein mentioned, or depart out of the said State: and it is by the same act provided that all and every such person and persons should have liberty, and that they might also nominate and appoint an attorney or attornies, to sell and dispose of his or their estates for his or their own use and benefit, as by the same act (among other things) may more fully appear. And the said Archibald and John Hamilton further say that they, on the said eighth day of April, in the year 1777 aforesaid, and long before then, were, and from the time of their nativities respectively continually hitherto have been and still are, subjects of, and owing allegiance to, the said king of Great

Britain; and that they, the said Archibald and John Hamilton, on the same day and year last aforesaid, and for a long time, (to-wit,) the space of ten years before the making of the same act, and until the time hereinafter mentioned, were merchants and copartners, living in the then State, and formerly province of North Carolina aforesaid, and had within and during the said space of ten years last past, before the making of the same act, traded immediately to Great Britain, (to-wit,) at —— in their own right, (that is to say,) at the State of North Carolina aforesaid, and now in the district of North Carolina aforesaid, and within the jurisdiction of this court. And after the said eighth day of April, in the year one thousand seven hundred and seventy-seven aforesaid, and before the time of the departure of the said Archibald and John Hamilton hereinafter mentioned (to-wit,) on the same — day of ———, in the said year 1777, at North Carolina aforesaid, now in the said district of North Carolina and within the jurisdiction of this court, the said John Eaton made his said writing obligatory in the said declaration mentioned; and by the same writing obligatory, he the said John Eaton, then and there *bona fide* contracted the said debt in the said declaration mentioned. And the said Archibald and John Hamilton, further say that, after the said eighth day of April, in the said year 1777, and after the making of the said writing obligatory, (to-wit,) on the — day of ———, in the year 1777 aforesaid, they, the said Archibald and John Hamilton, then being merchants and copartners as aforesaid, and having lived, resided and inhabited, and then living, residing and inhabiting in the State of North Carolina aforesaid, in the manner herein before mentioned, and having traded immediately to Great Britain aforesaid, within and during ten years last past before the making of the same act as aforesaid, and then being the subjects of, and owing allegiance to the said king of Great Britain as aforesaid, and the said John Eaton having contracted the said debt *bona fide* with the said Archibald and John Hamilton aforesaid; and the said Archibald and John Hamilton, being creditors in that respect as aforesaid, they and

each of them did refuse to take the oath of allegiance to the said State in the said act prescribed, and did withdraw themselves from the said State and from the United States of America aforesaid, and they and each of them did remove and depart out of the said State, (to-wit,) to Europe, in conformity to the tenor, true intent and meaning of, and in obedience to, the same last mentioned act of the General Assembly. And they, the said Archibald and John Hamilton further say, that by the definitive treaty of peace between the United States of America aforesaid and his Britannic Majesty aforesaid, made and done at Paris, after the said fourth day of July, in the said year 1776, and after the time of making of the said writing obligatory, and after the departure of the said Archibald and John Hamilton, in conformity and obedience to the act of the General Assembly herein before pleaded, and after the passing of the said act of the said General Assembly in the same plea in bar pleaded, (to-wit,) on the third day of September, in the year of our Lord 1783, it is (among other things) stipulated and agreed that creditors on either side should meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bona fide* debts heretofore contracted, as by the same treaty, (among other things) may more fully appear. And the said Archibald and John Hamilton further in fact say, that they, at the time of the making of the said definitive treaty, and for a long time before then, to-wit, on the said — day of ———, in the said year 1777, were, and from that same day continually hitherto have been, and still are creditors of the said John Eaton, by virtue of the writing obligatory in the said declaration mentioned, in manner and form as therein is declared, and on the side of his said Britannic Majesty, within the true intent and meaning of the said definitive treaty, (that is to say,) at the State of North Carolina aforesaid, now in the district of North Carolina, and within the jurisdiction of this court, and that they, the said Archibald and John Hamilton, at the time of the making of the said definitive treaty, at and before the passing of the said act of the General Assembly in the same plea in bar pleaded, and

at and before the departing of the said Archibald and John Hamilton, in conformity to the act of the General Assembly herein before pleaded, by way of reply, and at and before the time of the making of the said writing obligatory in the said declaration mentioned, and at and before the time of the making of the said act herein before pleaded, by way of reply, and on the said fourth day of July in the said year 1776, and long before, then and from the times of their nativities respectively, were, and from thence continually hitherto have been, and still are, subjects of his said Britannic majesty, owing and acknowledging their allegiance and obedience to him. And that the said debt, in the said declaration mentioned, was contracted, and the said writing obligatory therein also mentioned, made and executed by the said John Eaton *bona fide*, before the time of the making of the said definitive treaty, to wit, on the said — day of —— in the said year 1777, and the same debt still remains wholly due and owing from the said John Eaton to the said Archibald and John Hamilton, and hath not, nor hath any part thereof, been paid or satisfied to them, or either of them, that is to say, at the State of North Carolina aforesaid, and in the said district of North Carolina, and within the jurisdiction of this court. And the said Archibald and John Hamilton further say, that by the constitution ordained and established by the people of the United States for the United States of America, done in convention after the said third day of September, in the said year 1783, to-wit, on the seventeenth day of September in the year of our Lord 1787, it is (among other things) expressly declared that all treaties which were then made, or which should be made, under the authority of the United States, should be the supreme law of the land, anything in the said constitution or laws of any State to the contrary notwithstanding, as by the same constitution more fully appears. And the said Archibald and John Hamilton further say, that by an act made and provided in a General Assembly of the State of North Carolina begun and held at Tarborough, now in the district of North Carolina aforesaid, and within the jurisdiction of this court, after the said third day of Sep-

tember, in the said year one thousand seven hundred and eighty-three, and after the said seventeenth day of September in the said year 1787, to-wit, on the eighteenth day of November, in the year of our Lord 1787, and in the twelfth year of the independence of the said State, entitled an act declaring the treaty of peace between the United States of America and the king of Great Britain to be part of the law of the land, it is enacted by the authority of the same General Assembly, that the articles of the definitive treaty between the United States of America and the king of Great Britain, were thereby declared to be part of the law of the land. And it was also thereby further enacted by the same authority, that the Courts of Law and Equity were thereby declared in all cases and questions cognizable by them, respecting the said treaty, to judge accordingly; as by the same act more fully appears. Wherefore, for that the said Archibald and John Hamilton were merchants, and were and are subjects of the said king of Great Britain, and creditors on his side as aforesaid; and the said debt was *bona fide* contracted before the making of the said definitive treaty, and the ordaining and establishing of the said constitution, and the passing of the said act declaring the said definitive treaty to be part of the law of the land; they, the said Archibald and John Hamilton, pray judgment and their said debt, together with their damages, occasioned by the detaining of the same, to be adjudged to them, &c.

IV. And the said Archibald and John Hamilton, as to the said plea of the said John Eaton, by him fourthly above pleaded in bar, say that they, by reason of anything in that same plea alleged, ought not to be barred from having or maintaining their said action thereof against him; because, protesting that, that same plea and the matters therein contained are not sufficient in law to bar the said Archibald and John Hamilton from having or maintaining their said action against the said John Eaton; for replication, they the said Archibald and John Hamilton say that true it is that on the said fourth day of July, in the year 1776, and continually

afterwards, until the said thirtieth day of November, in the said year 1782, there was an open war between the said king of Great Britain and the United States of America aforesaid, and that on the said fourth day of July, in the said year 1776, the said Archibald and John Hamilton were residents and inhabitants, and each of them was a resident and inhabitant of this State, and continued to reside and inhabit within the same until the said 20th day of October, in the said year 1777. Yet the said Archibald and JohnHamilton further say, that by an act made and provided in a General Assembly of the State of North Carolina, begun and held at Newbern aforesaid, in the said State of North Carolina. and now in the district of North Carolina, and within the jurisdiction of this court, after the said fourth day of July, in the year one thousand seven hundred and seventy-six aforesaid, and before the time of the making of the said writing obligatory, to-wit, on the eighth day of April, in the said year 1777, entitled an act declaring what crimes and practices against the State shall be treason and what shall be misprision of treason, and providing punishments adequate to crimes of both classes, and for preventing the dangers which may arise from persons disaffected to the State, (among other things) it is enacted by the authority of the same General Assembly,that all the then late officers of the king of Great Britain, and all persons (quakers excepted) being subjects of the said State, then living therein, or who should thereafter come to live therein, who had traded immediately to Great Britain or Ireland, within ten years then last past, in their own right, or acted as factors, storekeepers or agents here, or in any of the United States of America, for merchants residing in Great Britain or Ireland, should take a certain oath of abjuration and allegiance therein mentioned, or depart out of the said State. And it is by the same act provided, that all and every such person and persons should have liberty, and that they might also nominate and appoint an attorney or attornies, to sell and dispose of his or their estate for his or their use and benefit, as by the same act (among other things) may more fully appear. And the said Archibald and John Hamilton further say, that they, on the said eighth day

of April, in the year one thousand seven hundred and seventy-seven aforesaid, and long before then, were, and from the time of their nativities respectively, continually hitherto have been, and still are, subjects of, and owing allegiance to, the said king of Great Britain. And that they, on the same day and year last aforesaid, and for a long time, to-wit, for the space of ten years before the making of the same act last mentioned, and until the said first day of September, in the said year one thousand seven hundred and seventy-seven, were merchants and copartners, living in the then State, and formerly province of North Carolina aforesaid, and had within and during the said space of ten years last past, before the making of the same last mentioned act, traded immediately to Great Britain, in their own right, that is to say, at the State of North Carolina aforesaid, and now in the district of North Carolina aforesaid, and within the jurisdiction of this Court: and after the said eighth day of April, in the said year 1777, and before the said twentieth day of October in the said year one thousand seven hundred and seventy-seven, to-wit, on the same — day of —— in the said year one thousand seven hundred and seventy-seven, at North Carolina aforesaid, now in the said district of North Carolina, and within the jurisdiction of this court, he the said John Eaton made his said writing obligatory in the said declaration mentioned, and by the same writing, he the said John Eaton, then and there *bona fide* contracted the said debt in the said declaration mentioned. And the said Archibald and John Hamilton further say, that after the said eighth day of April in the said year 1777, and after the making of the said writing obligatory, to-wit, on the said twentieth day of October, in the year 1777 aforesaid, they the said Archibald and John Hamilton, then being merchants and copartners as aforesaid, and having lived, resided and inhabited, and then living, residing and inhabiting in the State of North Carolina aforesaid, in the manner herein before mentioned, and having traded immediately to Great Britain aforesaid, within and during ten years last past before the making of the same act as aforesaid, and then being

the subject of, and owing allegiance to, the said king of Great Britain as aforesaid, and the said John Eaton having contracted the said debt *bona fide* with the said Archibald and John Hamilton aforesaid; and the said Archibald and John Hamilton, being creditors in that respect as aforesaid, did withdraw themselves from the said State and from the United States of America aforesaid, and they and each of them did remove and depart out of the said State, (to-wit,) to Europe, in conformity to the tenor, true intent and meaning of, and in obedience to, the same last mentioned act of the General Assembly, and continually afterwards, from the said twentieth day of October, in the said year 1777, until the termination of the said war, the said Archibald and John Hamilton resided beyond the limits of the said United States, under the sovereignty and jurisdiction of the said king, owing and acknowledging their allegiance to him, and during all the time last aforesaid, they, the said Archibald and John Hamilton, did not, nor did either of them, return into the said State, to be admitted citizens or a citizen thereof; and the said Archibald and John Hamilton further say, that true it is, that afterwards, such act of the General Assembly of this State, held at Halifax, on the eighteenth day of October, in the year 1779 aforesaid, was made as in the same plea in bar, fourthly above pleaded, is alleged. Yet they, the said Archibald and John Hamilton, further say, that by the definitive treaty of peace between the United States of America aforesaid and his Britannic Majesty aforesaid, made and done at Paris, after the said fourth day of July, in the said year 1776, and after the time of making of the said writing obligatory, and after the departure of the said Archibald and John Hamilton, in conformity and obedience to the act of the General Assembly herein before pleaded, and after the passing of the said act of the said General Assembly in the same plea in bar pleaded, (to-wit,) on the third day of September, in the year of our Lord 1783, it is (among other things) stipulated and agreed that creditors on either side should meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bona fide* debts theretofore contracted, as by the same

treaty, (among other things) may more fully appear. And the said Archibald and John Hamilton further in fact say, that they, at the time of the making of the said definitive treaty, and for a long time before then, (to-wit,) on the said — day of ———, in the said year 1777, were, and from that same day continually hitherto have been, and still are, creditors of the said John Eaton, by virtue of the writing obligatory in the said declaration mentioned, in manner and form as therein is declared, and on the side of his said Britannic Majesty, within the true intent and meaning of the said definitive treaty, (that is to say,) at the State of North Carolina aforesaid, now in the district of North Carolina, and within the jurisdiction of this court; and that they, the said Archibald and John Hamilton, at the time of the making of the said definitive treaty, at and before the passing of the said act of the General Assembly in the same plea in bar pleaded, and at and before the departing of the said Archibald and John Hamilton, in conformity to the act of the General Assembly herein before pleaded, by way of reply, and at and before the time of the making of the said writing obligatory in the said declaration mentioned, and at and before the time of the making of the said act herein before pleaded, by way of reply, and on the said fourth day of July in the said year 1776, and long before, then and from the times of their nativities respectively, were, and from thence continually hitherto have been, and still are, subjects of his said Britannic Majesty, owing and acknowledging their allegiance and obedience to him. And that the said debt, in the said declaration mentioned, was contracted, and the said writing obligatory therein also mentioned, made and executed by the said John Eaton, *bona fide*, before the time of the making of the said definitive treaty, (to-wit,) on the said — day of ———, in the said year 1777, and the same debt still remains wholly due and owing from the said John Eaton to the said Archibald and John Hamilton, nor hath any part thereof been paid or satisfied to them or either of them, that is to say, at the State of North Carolina aforesaid, now in the

said district of North Carolina, and within the jurisdiction of this court. And the said Archibald and John Hamilton further say that by the constitution ordained and established by the people of the United States for the United States of America, done in convention after the said third day of September, in the said year 1783, (to-wit,) on the seventeenth day of September in the year of our Lord 1783, it is (among other things) expressly declared that all treaties which were then made, or which should be made, under the authority of the United States, should be the supreme law of the land, anything in the said constitution or laws of any State to the contrary notwithstanding; as by the same constitution more fully appears. And the said Archibald and John Hamilton further say that, by an act made and provided in a General Assembly of the State of North Carolina begun and held at Tarborough, now in the district of North Carolina aforesaid, and within the jurisdiction of this court, after the said third day of September, in the said year one thousand seven hundred and eighty-three, and after the said seventeenth day of September, in the said year 1787, to-wit, on the eighteenth day of November, in the year of our Lord 1787, and in the twelfth year of the independence of the said State, entitled an act declaring the treaty of peace between the United States of America and the king of Great Britain to be part of the law of the land, it is enacted by the authority of the same General Assembly, that the articles of the definitive treaty between the United States of America and the king of Great Britain, were thereby declared to be part of the law of the land. And it was also thereby further enacted by the same authority, that the courts of law and equity were thereby declared in all cases and questions cognizable by them, respecting the said treaty, to judge accordingly; as by the same act more fully appears. Wherefore, for that the said Archibald and John Hamilton were merchants, and were and are subjects of the said king of Great Britain, and creditors on his side as aforesaid; and the said debt was *bona fide* contracted before the making of the said definitive treaty, and the ordaining and establish-

ing of the said constitution, and the passing of the said act declaring the said definitive treaty to be part of the law of the land; they, the said Archibald and John Hamilton, pray judgment and their said debt, together with their damages, occasioned by the detaining of the same, to be adjudged to them, &c.

W. R. DAVIE, *pro Quær.*

DEMURRERS.

I. And the said John Eaton says that the plea aforesaid, by the said Archibald and John Hamilton, above in replying first pleaded, and the matters therein contained, are not sufficient in law, to compel the said John Eaton to answer to the aforesaid declaration of said Archibald and John Hamilton to which the said John Eaton has no necessity, nor is he, by the law of the land bound, in any manner to answer: and this he is ready to verify. Wherefore, for default of a sufficient replication of the said Archibald and John Hamilton in this behalf, the said John Eaton as before prays judgment, whether the said Archibald and John Hamilton ought to have and maintain their said action against him, &c.

II. And the said John Eaton says that the plea aforesaid, by the said Archibald and John Hamilton, above in replying secondly pleaded, &c., as above.

III. And the said John Eaton says that the plea aforesaid, by the said Archibald and John Hamilton, above in replying thirdly pleaded, &c., as above.

IV. And the said John Eaton says that the plea aforesaid, by the said Archibald and John Hamilton, above in replying fourthly pleaded, &c., as above.

JOHN HAYWOOD, *pro. Def.*

JOINDERS IN DEMURRER.

I. And the said Archibald and John Hamilton say that the plea aforesaid by them the said Archibald and John Hamilton in manner and form aforesaid first above in replying pleaded, and the matter therein contained, are good and sufficient in law to compel the said John Eaton to answer to the declaration of them, the said Archibald and John Ham-

ilton; which said plea and the matter therein contained the said Archibald and John Hamilton are ready to verify and prove, as the court, &c. And because the said John Eaton to that plea doth not answer, nor has hitherto any way denied it, the said Archibald and John Hamilton pray judgment, &c.

II. And the said Archibald and John Hamilton say that the plea aforesaid by them the said Archibald and John Hamilton in manner and form aforesaid secondly above in replying pleaded, &c., as above.

III. And the said Archibald and John Hamilton say, that the plea aforesaid by them the said Archibald and John Hamilton in manner and form aforesaid thirdly above in reply pleaded, &c., as above.

IV. And the said Archibald and John Hamilton say that the plea aforesaid by them the said Archibald and John Hamilton in manner and form aforesaid fourthly above in replying pleaded, &c., as above.

W. R. DAVIE, *pro Quær.*

At June Term, 1796, this cause was argued by

Baker, for the demurrer, and

Davie, for the plaintiffs.

SITGREAVES, J. This is an action of debt, brought by the plaintiffs, to recover of the defendant, on an obligation made in the year 1776. The defendant has pleaded four several pleas in bar, which are now for the decision of the court by demurrer.

I shall consider of the case as it appears by the first plea; which places the defendant on the most advantageous ground; as a decision on that will probably govern all the cases arising out of the subsequent pleas.

The case it appears by the first plea, is as follows: the plaintiffs were merchants, residents of North Carolina, before and at the time of the declaration of independence. By an act of the legislature of North Carolina, passed in April, 1777, it was among other things enacted, "that all persons, being subjects of this State, and now living therein,

or who shall hereafter come to live therein, who have traded immediately to Great Britain or Ireland, within ten years last past, in their own right, or acted as factors, storekeepers or agents here, or in any of the United States of America, for merchants residing in Great Britain or Ireland, shall take an oath of abjuration and allegiance, or depart out of the State." By the same act, such persons were permitted to sell their estates, to export the amount thereof in produce, and to appoint attornies to sell and dispose of their estates for their use and benefit. The plaintiffs, falling within the description of persons contemplated by this act, and refusing to take the oath, departed the State: the debt which is the subject of the present suit then existing. By subsequent acts of the legislature, all the estates, rights, properties and debts of certain persons, among which the plaintiffs are specially named, are declared to be confiscated: and the debts due to such persons are directed to be paid to certain commissioners, to be appointed by the County Courts for that purpose, by all persons within the State, owing the same, under pain of imprisonment; which payment it is declared shall forever indemnify and acquit the persons paying the same, their heirs, &c. against any future claim for the money mentioned in the receipts or discharges of such commissioners. In obedience to those acts, the defendant paid the debt in question, to the commissioners authorized to receive it, and relies on that payment as legal, and a full and sufficient discharge. The plaintiffs, admitting the fact of payment, rely on the construction of the treaty of peace; the law of the State declaring that treaty to be part of the law of the land; and the constitution of the United States. The counsel for the plaintiffs, in support of their claim, has in the course of his argument, presented to the view, a doubt whether the debt in the present question has been confiscated in a strictly legal sense, by any of the acts called confiscation acts? and has urged that doubt strenuously, and with much force of argument; contemplating them as a body of penal law, and of course subject to the legal rules of construction in such cases. The observations on that point would merit much attention; but I deem it not absolutely necessary to

investigate that question, in forming an opinion upon the present case: and shall confine my observations solely to the law and the facts, as they arise out of the pleadings, in the first plea of the defendant, which admits alone of this question, viz:

Are the plaintiffs barred of a recovery?

It would appear quite unnecessary to enquire whether Congress, under whose authority the treaty was negotiated, was vested by the States with a power competent to enter into such a contract, had not part of the arguments of the defendant's counsel seemed to require it. No one will doubt, if they had the power, the treaty consequently became obligatory on the people of the United States, when made and duly ratified.

Whatever agreement the States may have entered into, at the declaration of independence, and to what purposes and extent that agreement may or may not have bound them, as a confederated body; it is clear that at a subsequent period, and previous to the negotiation of this treaty, they, by their delegates in Congress, formed and entered into a solemn compact, by which they plight and engage the faith of their constituents, to abide by the determination of the United States in Congress assembled, *on all questions* which by the confederation are submitted to them; and that the articles thereof, shall be *inviolably* observed by the States. Among many other portions of sovereignty which the States thought proper to deposit in that confederated head, was the *sole* and *exclusive* right and power of determining on peace and war, (except in certain cases specially enumerated,) of sending and receiving ambassadors, entering into treaties and alliances. No words can be more comprehensive or express, relative to the point in question: nor is there offered to my mind the least room for doubt. Admitting for argument's sake what has been contended, that the ministers, who negotiated the treaty, exceeded the powers granted them, certainly the ratification of that instrument, by Congress confirmed and legalized all that had been done by them; and if it could be supposed, as has been said, that Congress in the ratification of it, exceeded

the powers vested in them by the States, the act of Assembly of this State, passed in 1787, must have extinguished every scintilla of doubt, as to its validity and obligatory force on their citizens. The act is a perfect recognition of the whole treaty, declares it to be part of the law of the land, and directs the judges to decide accordingly. The last mentioned act must surely be sufficient to satisfy the mind of the most scrupulous and sceptical.—For myself, I do not hesitate to declare, that it adds nothing to the validity or legality of the treaty ; that its ratification by Congress was alone sufficient, and that the act of Assembly of the State was superfluous.

The counsel for the defendant has contended that, by the operation of the acts of confiscation, and the payment into the treasury, the plaintiffs were wholly divested of their right ; and the same, if existing at all, was vested in the State. This forms a material part of his defense, and if it had been clearly evinced, that the right of the plaintiffs was wholly extinguished, by the operation of the confiscation acts, and could not possibly be revived or restored, by any subsequent act of the State, or the nation, it would follow of course, that they could have no demand against the defendant. In support of this argument it is said, 4 Bacon, 637, that all acts done under a statute while in force, are good notwithstanding a subsequent repeal. I am ready to admit the principle in its fullest extent, in the exposition of a statute or municipal law of any particular State. It is consonant with reason, and is justified by the necessity of the case ; it prevents much confusion and embarrassment and insures a ready submission to the laws, by a confidence in the security impliedly promised to such obedience. If the treaty was now to be considered as an act of the State, and emanating from the same authority only that produced the acts of confiscation, this reasoning might be solid. But that instrument cannot be subject to the ordinary rules of construction, which govern in the exposition of statutes of a particular State. These have for their object the regulation of the rights of a distinct community or society only, whose inter-

ests being similar, are equally affected by an uniform regulation of their rights; who are alike united by the allegiance due to, and protection from, the same government; that is a compact formed between two separate and distinct nations, relative to certain specified subjects which involve interests of their respective citizens or people, unavoidably clashing with each other.

The one is an act of a State, but a component part of the nation, providing for the benefit of its own citizens. The other a compact of the whole nation (of which that State is but a part) with another nation, which must necessarily control all acts issuing from the inferior authority which might contravene it. This is evinced by that plain and strong expression in the constitution of the United States, which declares, "that all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the Judges in every State, shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." Taking it for granted then, that the treaty is not to be governed, when in opposition to particular laws, by the rigid rules of the common law; nor to be restrained in its operation by any statute or any particular State, but that "it ought to be interpreted in such manner as that it may have its effect, and not be found vain and illusive," I will proceed to consider of the operation of the 4th article.

Art. 4th. "It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money of all *bona fide* debts heretofore contracted."

This article appears to me so clear, precise and definite, that one would be at some loss to select other words to render it more so. But it has been contended by the defendant's counsel that, by a true construction of this article, it will appear much less general than the expressions would warrant; that it is a provision for real British subjects only, that is, persons resident in Great Britain at the commencement of the war; a term used in contradiction to many other descriptions of people, who, in the

course of the war, took part with that nation, and that this construction is justified by the term sterling money. In order to support this exposition, a reference has been had to the 5th and 6th articles.

The 4th art. contains the only stipulation with respect to debts. In the whole instrument it is mutual and general in its expression not limited or restrained by any particular words, to any description of persons, as it is evident in the 5th. art. If that had been in the contemplation of the parties, they could not have overlooked the necessity for these distinctions; nor are we at liberty to presume it. In the next article, the distinction is made with great accuracy, with regard to those who may endeavor to procure a restitution of their lands and other property. With respect to the expression sterling money, it appears to me that was probably concluded on as a standard, whereby to estimate the value of money due; it being, no doubt, apprehended that a depreciated paper medium circulated in many States of the Union, the nominal sum in which might not produce the intrinsic value of the debt due.

Another construction has been placed on this article, equally, in my opinion, unfounded, with the foregoing. It has been said, the article was only intended to take off from British subjects their disability as alien enemies to sue. Every one knows that disability can only exist during the continuance of a war, it would have been therefore unnecessary to provide for it in a treaty of peace, when it is obvious, the peace itself, agreeably to the long established principles of law, removed all such disability without any special stipulation. The word *recovery* admits not of such an idea. The terms *sue* and *recover* have very different import, in practice. The difference is daily exemplified in our courts, and the distinction appears evident, in the body of that instrument: in the latter part of the 5th article, it is stipulated that certain persons shall meet with no lawful impediment in the *prosecution* of their just rights. In the 4th art. the words are no lawful impediment to the *recovery* of their

* *Vattel*, 382.

debts. The distinction is obvious, and the terms aptly applied in each case. In the former relative to lands and other property which had been confiscated, and a restoration of which entirely depended on the liberality of the Legislatures, the term *recovery* would have been improper; in the latter, in which a payment to the creditor was positively stipulated, the expression is correct.

Vattel says, p. 369, "when an act is conceived in clear and precise terms, when the sense is manifest, and leads to nothing absurd; there can be no reason to refuse the sense which this treaty naturally presents; to go elsewhere in search of conjectures in order to extinguish or restrain it, is to endeavor to elude it."

It is therefore my opinion, that this article does control the operation of the acts of confiscation, relative to debts; that the plaintiffs in this case, are entitled to recover on the first demurrer; the plea in that case being the strongest ground of defense made by the defendant; that therefore judgment be given for the plaintiffs on each of the demurrers.

The State, who has compelled the payment from the creditor by a threat of severe punishment, will certainly feel bound by every principle of moral obligation to reimburse, in the most ample manner, all those who have made such payments. In addition to the moral tie that it is bound by, a solemn promise so to do is clearly expressed by an act of the Legislature.

I have only to observe, that I have considered this case as of the utmost importance; that I have given it all the attention and consideration in my power to bestow at this time and place; that if my opinion is founded in error, which is possibly the case, happily for the defendant, there is a higher tribunal where the error may be corrected.

Ellsworth, C. J. It is admitted that the bond on which this suit is brought, was executed by the defendant to the plaintiffs; and that the plaintiffs have not been paid. But the defendant pleads that since the execution of the bond a war has existed, in which the plaintiffs were enemies; and that during the war this debt was confiscated

and the money paid into the treasury of the State. And the plaintiffs reply, that by the treaty which terminated the war, it was stipulated, that "creditors on either side should meet with no lawful impediment, to the recovery of *bona fide* debts heretofore contracted."

Debts contracted to an alien, are not extinguished by the intervention of a war with his nation. His remedy is suspended while the war lasts, because it would be dangerous to admit him into the country, or to correspond with agents in it; and also because a transfer of treasure from the country to his nation, would diminish the ability of the former, and increase that of the latter, to prosecute the war. But with the termination of hostilities, these reasons and the suspension of the remedy cease.

As to the confiscation here alleged it is doubtless true, that enemy's debts, so far as consists in barring the creditor, and compelling payment from the debtors for the use of the public, can be confiscated; and that on principles of equity, though perhaps not of policy, they may be. For their confiscation, as well as that of property of any kind, may serve as an indemnity for the expenses of war, and as a security against future aggression. That such confiscations have fallen into disuse, has resulted not from the duty which one nation, independent of treaties, owes to another, but from commercial policy, which European nations have found a common, and indeed a strong interest, in supporting. Civil war, which terminates in a severance of empire, does, perhaps, less than any other, justify the confiscation of debts; because of the special relation and confidence subsisting, at the time they were contracted, and it may have been owing to this consideration, as well as others, that the American States, in the late revolution, so generally forbore to confiscate the debts of British subjects. In Virginia, they were only sequestered; in South Carolina, all debts, to whomsoever due, were excepted from confiscation; as were in Georgia, those of "British merchants and others residing in Great Britain." And in the other States, except this, I do not recollect that British debts were touched. Certain it is, that

the recommendation of Congress on the subject of confiscation did not extend to them. North Carolina, however, judging for herself, in a moment of severe pressure, exercised the sovereign power of passing an act of confiscation, which extended, among others, to the debts of the plaintiffs. Providing, however, at the same time, as to all debts which should be paid into the treasury, under that act, that the State would indemnify the debtors, should they be obliged to pay again.

Allowing then that the debt in question was in fact and of right confiscated, can the plaintiffs recover by the treaty of 1783?

The 4th article of that treaty is in the following words: "It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money, of all *bona fide* debts heretofore contracted."

There is no doubt but the debt in question was a "*bona fide*" debt, and *theretofore* contracted, i. e. prior to the treaty. To bring it within the article, it is also requisite that the debtor and creditor should have been on different sides, with reference to the parties to the treaty, and as the defendant was confessedly a citizen of the United States, it must appear that the plaintiffs were subjects of the king of Great Britain; and it is pretty clear, from the pleadings and the laws of the State, that they were so. It is true that on the 4th of July, 1776, when North Carolina became an independent State, they were inhabitants thereof, though natives of Great Britain; and they might have been claimed and holden as citizens, whatever were their sentiments or inclinations. But the State afterwards in 1777, liberally gave to them with others similarly circumstanced, the option of taking an oath of allegiance, or of departing the State under a prohibition to return, with the indulgence of a time to sell their estates, and collect and remove their effects. They chose the latter; and ever after adhered to the king of Great Britain, and must therefore be regarded as on the British side.

It is also pertinent to the enquiry, whether the debt in

question be within the before recited article, to notice an objection which has been stated by the defendant's counsel, viz. that at the date of the treaty, what is now sued for as a debt, was not a *debt*, but a nonentity; payment having been made, and a discharge effected, under the act of confiscation; and therefore that the stipulation concerning *debts* did not reach it.

In the first place, it is not true that in this case, there was no debt at the date of the treaty. A debt is created by contract, and exists till the contract is performed. Legislative interference, to exonerate a debtor from the performance of his contract, whether upon or without conditions, or to take from the creditor the protection of law, does not in strictness destroy the debt, though it may, locally, the remedy for it. The debt remains, and in a foreign country payment is frequently inforced.

Secondly, it was manifestly the design of the stipulation, that where debts had been *theretofore contracted*, there should be no bar to their recovery, from the operation of laws passed subsequent to the contracts. And to adopt a narrower construction, would be to leave creditors to a harder fate than they have been left to, by any modern treaty.

Upon a view then of all the circumstances of this case, it must be considered as one within the stipulation, that there should be "no lawful impediment to a recovery." And it is not to be doubted, that impediments created by the act of confiscation, are *lawful* impediments. They must therefore be disregarded, if the treaty is a rule of decision. Whether it is so or not, remains to be considered.

Here it is contended by the defendant's counsel, that the confiscation act has not been repealed by the State; that the treaty could not repeal or annul it; and therefore that it remains in force, and secures the defendant. And further, that a repeal of it would not take from him a right vested, to stand discharged.

As to the opinion, that a treaty does not annul a statute, so far as there is an interference, it is unsound. A statute is a declaration of the public will, and of high authority; but it

is controlable by the public will subsequently declared. — Hence the maxim, that when two statutes are opposed to each other, the latter abrogates the former. Nor is it material, as to the effect of the public will, what organ it is declared by, provided it be an organ constitutionally authorized to make the declaration. A treaty when it is in fact made, is, with regard to each nation that is a party to it, a national act, an expression of the national will, as much so as a statute can be. And it does, therefore, of necessity, annul any prior statute, so far as there is an interference. The supposition that the public can have two wills at the same time, repugnant to each other, one expressed by a statute, and another by a treaty, is absurd.

The treaty now under consideration was made, on the part of the United States, by a Congress composed of deputies from each State, to whom were delegated by the articles of confederation, expressly, "the sole and exclusive right and power of entering into treaties and alliances;" and being ratified and made by them, it became a complete national act, and the act and law of every State.

If however, a subsequent sanction of this State was at all necessary to make the treaty law here, it has been had and repeated. By a statute passed in 1787, the treaty was declared to be law in this State, and the courts of law and equity were enjoined to govern their decisions accordingly. And in 1789, was adopted here the present constitution of the United States, which declared, that all treaties made, or which should be made, under the authority of the United States, should be the supreme law of the land; and that the judges in every State should be bound thereby; anything in the constitution or laws of any State to the contrary notwithstanding. Surely then, the treaty is now law in this State, and the confiscation act, so far as the treaty interferes with it, is annulled.

Still it is urged, that annulling the confiscation act cannot annul the defendant's right of discharge, acquired while the act was in force.

It is true, that the repeal of a law does not make void

what has been well done under it. But it is also true, admitting the right here claimed by the defendant, to be as substantial as a right of property can be, that he may be deprived of it, if the treaty so requires. It is justifiable and frequent, in the adjustment of national differences, to concede for the safety of the State, the rights of individuals. And they are afterwards indemnified or not, according to circumstances. What is most material to be here noted is, that the right or obstacle in question, whatever it may amount to, has been created by law, and not by the creditors. It comes within the description of "lawful impediments;" all of which, in this case, the treaty, as I apprehend, removes.

LET JUDGMENT BE FOR THE PLAINTIFFS.

June Term, 1791.

GUION v. McCULLOCK, et al.---Page 78.

A writ in debt "*that they answer unto him of a plea of debt of* 1,000 *dollars*" held good on a demurrer to a plea in abatement, that the writ did not run in the *debit and detinet*.

Action on a bond. The writ was filled up, "that they answer unto him of a plea of debt of 1000 dollars, (the penalty of the bond); plea in abatement, because the writ did not run in the usual form, "in the *debet* and *detinet:*" general demurrer.

Graham, for the plaintiff.

Slade, for defendant.

IREDELL, J. and SITGREAVES J., notwithstanding the pointed authority produced hy *Slade*, overruled the plea. They held the writ was deemed sufficient, because it agreed with the *ac etiam* clauses, inserted in actions of debt, in the bill of Middlesex, according to the English practice.

NOTE.---See *Page* v. *Farmer*, 2 Murph. Rep,, 288. S. C. 1 Car. L. Repos., 278.

June Term, 1792.

PALYART v. GOULDING.—Page 78.

A firm in Maryland gave its promissory note to A. signed in the name of a firm, and A. sued one of the partners alone, relying on the act of 1789 (see 1 Rev. Stat. ch. 31, sec. 89); *Held* that he might do so, as that act did not affect the contract, but only extended the remedy.

The defendant and his two brothers carried on business as merchants, in the State of Maryland, under the firm of John Goulding and brothers, and in the year 1791, gave the plaintiff the promissory note, on which this action was brought for a debt of the said partnership, signed John Goulding & Brothers, the style of the firm. The defendant (being the only partner in this State,) was sued alone: he pleaded in abatement to the action, that this contract was entered into, in the State of Maryland, and that the other partners who were living, and not named, ought to be made defendants. To this plea there was a general demurrer.

Graham, in support of the demurrer, relied wholly on the fifth section of the act of Assembly of this State. 1789, 57, 688.

Woods and *Martin* contended that this case came within the rule of *lex loci*, and that to allow this act the operation insisted on for the plaintiff, would substantially alter the contract.

But PATTERSON, J., took a distinction between the contract and the remedy: and observed, that the contract remained the same, notwithstanding this act: and that the remedy only was extended.

And SITGREAVES, J., *accordante:*

A *respondeas ouster* was awarded.

June Term, 1792.

UNITED STATES v. MAUNIER.—Page 79.

The length and depth of a wound need not be stated in an indictment for murder.

Murder on the high seas. Mr. Attorney of the United States, *Hill*, offered to give in evidence, the examination of the prisoner, before his commitment.

Martin, for the prisoner, objected to this:

1. Because the prisoner at the time of his examination, was *under impressions of fear.*

2. Because the examination was *not subscribed by the prisoner.*

Patterson, J., thought the examination ought to have been signed by the prisoner.

Sitgreaves, J., said the first objection had much weight with him, and

Mr. Attorney of the U. S. withdrew his motion.

The prisoner was found guilty upon other evidence.

And it was moved in arrest of judgment, on the ground that the length and depth of the wound were not mentioned in the indictment.

The prisoner's counsel cited 4 Co., 42. *Haydon's* case.

The Court did not intimate that they had any doubt, but said if they had they would direct a copy of the indictment and reasons to be transmitted to the Supreme Court.

CURIA ADVISARE VULT.

The Court directed the prisoner to be arraigned on another indictment, which had been found against him.

Whereupon he pleaded not guilty, and the Court ordered the trial to be proceeded on instantly:

And with some difficulty was prevailed on to adjourn it to the succeeding Monday, it being Saturday.

An order was then made, that the Marshal send expresses to the grand jury (who had been discharged,) commanding their immediate return.

On the Monday following, the prisoner was brought to the bar, as he and his counsel expected, to be tried on the second indictment:

But the Court informed the bar, they would take up the motion in arrest of judgment.

On the part of the United States, several precedents of indictments were read out of *West*, in which the length and depth of the wound are not mentioned.

Martin observed, that in all the indictments, (but one) in which the length and depth of the wound were not mentioned, the instrument had gone through the body of the person killed, some limb had been cut off, or the wound had been given with a blunt weapon. In this case the mortal wound was stated to have been given with an axe on the head — that the authority in Coke, was not only unshaken but frequently recognized.

The Court however overruled the motion, without making any observation, and passed sentence of death.

***At the same time sentence was passed on three other men who had been included in the same indictment; and they were soon after executed. This is the first time that judgment of death was given under the authority of the United States.

NOTE.—The case of the *State* v. *Owen*, 1 Murph. Rep., 452, decides that a statement of the dimensions of the mortal wound is essential in an indictment for murder; but it has since been held in the *State* v. *Moses*, 2 Dev. Rep., 452., that the omission of such statement is cured by the act of 1811, (see 1 Rev. Stat., ch. 35, Sec. 12.)

November Term, 1796.

JONES v. NEALE & BLOUNT.—Page 81.

The act of Congress passed in 1789 "to establish the Judicial Courts of the United States," which provides for taking depositions *de bene esse* in certain cases, one of which is where the witness lives more than one hundred miles from the place of trial, is to be construed strictly, and if the reasons of the deposition's being taken, and of notice, &c., be not sealed up by the magistrate and directed to the court, it cannot be read.

Debt on bond. To prove the execution of the bond, the plaintiff's counsel offered a deposition of the subscribing witness, who resided at Newbern, about 130 miles from Raleigh. It appeared that the witness had been subpœnaed by the plaintiff, but did not attend, and that he was at home in good health.

The deposition was offered as one taken in pursuance of the 30th section of the act of Congress, entitled "An act to establish the Judicial Courts of the United States:" approved the 24th September, 1789; which provides for the taking depositions *de bene esse* in certain cases; one of which is where the witness shall live at a greater distance from the place of trial than 100 miles.

Two objections were made by the defendant's counsel to the reading this deposition.

1. That it was taken *de bene esse* only, and therefore could not be read, unless the party offering it, first proved that the personal attendance of the witness could not be obtained. But here it appeared that he was within reach of the process of the court, and in sufficient health to attend.

2. That the certificate of the Magistrate, who took the

deposition, did not set forth the reasons of taking it, which is made necessary by the act of Congress.

To the first objection it was answered by the plaintiff's counsel, that the manifest intention of the act is, that those circumstances which authorize the taking of a deposition *de bene esse*, should if they exist at the time of trial, entitle it to be read. That the residence of the witness at a greater distance from the place of trial than 100 miles is, by the act, placed on the same footing with his age, infirmity, going to sea, &c., and is equally a good cause for taking his deposition *de bene esse*. But the age or infirmity of a witness, would without doubt excuse his non-attendance, and entitle his deposition to be read ; and there is good ground to infer the same of his residence at a greater distance from the place of trial than 100 miles.

This construction is greatly corroborated by that clause of the act, which defines the evidence admissible on appeals; but if a contrary construction should prevail, it appeared that the plaintiff had caused the witness to be subpœnaed, which was all that could be required to enforce his attendance, and if that proved ineffectual, the deposition ought to be read.

To the 2d objection :—that the act of Congress requires the magistrate taking a deposition, to certify the reasons of taking it, in order to save the party at whose instance it is taken, the trouble and expense of bringing witnesses from a great distance, to prove the age, infirmity, &c., of the witness examined ; but it left the party at liberty to incur this trouble and expense if he thought proper ; as in taking depositions under commissions, issued from the State Courts of this State, the party at whose instance the deposition is taken may procure the commissioner to certify that notice of the time and place of caption was given to the adverse party ; and such certificate is received by the court as conclusive evidence, as to that point ; but if the commissioner failed to certify, the party must establish the fact.

By the Court, PATTERSON, J., and SITGREAVES, J. It appears to be the true construction of the act of Congress, that those circumstances which will warrant the taking of a deposition *de bene esse*, should, if they exist at the time of trial, authorize the reading of it. But as this act is made in derogation of the common law it must be strictly construed, and literally observed. To fail in one iota of the ceremonies prescribed by it is to fail in the whole.

The act requires that the deposition shall be retained by the magistrate taking it until he deliver the same with his own hand, into the Court for which it is taken, or shall, together with the reasons of its being taken, and of notice, &c., be by him sealed up and directed to such court. This part of the act has not been observed, therefore the deposition cannot be read.

Badger and *Taylor*, for the plaintiff.
Woods, for the defendants.

IN EQUITY, *November Term*, 1796.

BOND *v.* ALLEN & OTHERS, Ex'rs.—Page 83.

The 4th and 5th sections of the act of 1789, 1 Rev. Code, ch. 308, (see Rev Stat., ch. 65, sec. 12,) limiting the time within which suits are to be brought against executors and administrators, must be taken together, and the defendant to entitle himself to the benefit of the 4th must show that he has complied with the requisites of the 5th section.

On exception taken to the defendant's plea, grounded on the 4th section of 1789, 23, 677, respecting the limitation of time, for bringing suit against administrators and executors.

The Court, PATTERSON J., and SITGREAVES, J., held that the 4th and 5th sections of that act must be taken together ;

that the defendant ought to have entitled himself to the benefit of the 4th section, by shewing he had complied with the requisites in the 5th: and as this was not set forth, the plea was overruled.

Badger, for the complainant.
Baker, for the defendant.

NOTE.—See *Blount* v. *Porterfield*, 2 Hay. Rep., 161. *McLin* v. *McNamara*, 2 Dev. & Bat. Eq. Rep., 82. *Salter* v. *Blount*, Ibid., 218.

NORTH CAROLINA REPORTS.

EMBRACING

"CASES DETERMINED IN THE SUPERIOR COURTS OF LAW AND EQUITY OF THE STATE OF NORTH CAROLINA."

BY JOHN LOUIS TAYLOR,
(One of the Judges of the said Courts.)

—ALSO—

"REPORTS OF CASES RULED AND DETERMINED BY THE COURT OF CONFERENCE OF NORTH CAROLINA."

BY DUNCAN CAMERON
AND
WILLIAM NORWOOD, of Hillsborough.

SECOND EDITION,

WITH NOTES REFERRING TO SUBSEQUENT ENACTMENTS OF THE LEGISLATURE, AND DECISIONS OF THE COURT OF CONFERENCE AND THE SUPREME COURT, MARGINAL ABSTRACTS, A TABLE OF THE CASES REPORTED, AND A NEW INDEX.

BY WILLIAM H. BATTLE, ESQ.,
One of the Judges of the Superior Courts of Law and Courts of Equity of the State of North Carolina.

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TAYLOR'S REPORTS.

CASES DETERMINED IN THE SUPERIOR COURTS, &c.

MORGAN DISTRICT, *March Term*, 1799.

SPRUCE MACAY and JOHN LOUIS TAYLOR, Judges.

IRWIN v. SHERRIL.—Page 1.

An action lies against one not a party to the contract for deceitfully asserting that an unsound mare is sound, and fraudulently encouraging the plaintiff to buy her.

Action of deceit; plea, general issue. The declaration charged, that the defendant, intending to deceive and defraud the plaintiff, did wrongfully and deceitfully encourage and persuade him to purchase from one *John Irwin* a certain mare; and did for that purpose then and there falsely and deceitfully assert and affirm to the plaintiff, that the said mare was free and clear of and from all disease, and was sound; and the plaintiff, confiding in the said affirmation, did purchase the said mare: whereas, at the time, she was unsound and subject to a disease called the yellow water, and that the defendant well knew the same, &c.

The substance of the proof was, that the plaintiff, being about to purchase the mare from *John Irwin*, enquired of him whether she was sound: *Irwin* made no direct answer to the question; but, having purchased the mare from the defendant, referred the plaintiff to him for the desired information.

The plaintiff accordingly applied to the defendant, and received from him a positive assurance that the mare was sound, upon which he immediately completed the bargain with *John Irwin;* and shortly afterwards the mare died

under the ordinary and well known symptoms of the yellow water. During the time the mare had been in the defendant's possession, she wasted away, although the same care was taken of her as of his other beasts, which under the same treatment had thriven: this he accounted for to his neighbors, who enquired whether she had not the yellow water, by telling them it proceeded from hard usage, and from her having lost a colt. Except this evidence, there was no proof against the defendant of his knowledge of the unsoundness of the mare.

It was argued *for the defendant*, that admitting the plaintiff's case to be as the declaration charged it, no action would lie, for want of privity between the parties. That the defendant having no interest in the bargain, and receiving no consideration from the plaintiff, is not responsible to him for the loss he may have sustained, which was *damnum absque injuria.*

For the *plaintiff*, it was answered, that an action would lie whether there was fraud and deceit in the defendant, and an injury thence resulting to the plaintiff, and the case of *Passey* v. *Freeman*, 3 Term Rep., was cited, as in point.

The Court, after summing up the evidence to the jury, stated to them, that in order to understand its force and application, it became necessary to distinguish this action, from one with which it had been confounded, and to which it bore but a remote resemblance. That it was not founded upon a warranty, in which case a privity of contract must exist between the plaintiff and defendant; in this case no privity of contract was necessary: for the cause of action is completely made out, when the defendant practices a fraud, with the view of deceiving the plaintiff, who, in consequence thereof, sustains a loss.

The defendant's intent was essential, and it could only be collected from his knowledge of the real situation of the mare; in which respect, also, this action differs from the one founded on a warrant. That extends to all defects, whether the seller knew them or not: this can only be sustained against a person, who knew that the affirmation he made

was a false one, and who uttered it with a fraudulent intention.

Thus, according to the case cited, if a man, about to contract with another, but ignorant of his circumstances, applies to a third person for information, who assures him that he may safely be trusted; in such case, the affirmant is not liable, unless it be shewn, that at the time he gave the information, he well knew the man might not safely be trusted. For if, when he asserted it, he really believed it, though it were not true, it is a loss without an injury, and therefore is not the subject of an action. So it is for telling a bare, naked lie, the truth or falsehood of which were alike unknown to the defendant; no action is maintainable: but where it is uttered by a person who, at the time, knew its falsehood, and a loss afterwards ensues to the plaintiff in consequence of it, an action will lie.

It is attested, by some of the witnesses, that the defendant had before owned the mare, and had sold her to *John Irwin*, who possessed her but a short time before the sale to the plaintiff; it may therefore, possibly be inferred, that whether she were sound or otherwise, was a fact more peculiarly within his knowledge, than any other person's; for there were no constant external symptoms, from which a person unskilled in horses could have drawn the conclusion: nor was it a subject upon which the by-standers could exercise their judgment, or the plaintiff safely trust his own.

It is true that the defendant was under no obligation to satisfy the plaintiff's enquiry; but if he thought proper to answer, he was bound not to make a fraudulent representation: no man can claim the right of deceiving another. If, therefore, the jury believe that the plaintiff's case, as comprised in the declaration, is established in point of fact, he is entitled to their verdict. If the proof upon any of the points stated is not satisfactory to them, the verdict should be for the defendant.

NOTE.—See *Erwin* v. *Greenlee*, 1 Dev. & Bat. Rep., 39, where it was held that if the defendant in an execution fraudulently induces the sheriff to sell unsound property of his, and at the sale fraudulently represents it to be sound, an action for a deceit lies against him by the purchaser.

TREASURER OF THE STATE v. NALL.—Page 5.

A collector of arrearages, whose commissions depend upon the amount of the recovery in the suit is not a competent witness to prove a fraud against a defendant charged with fraudulently buying a sheriff 's property.

This was a proceeding by *scire facias* against the defendant, who, it was suggested, had fraudulently purchased the property of a sheriff, upon an execution issued against him, upon a judgment recovered by the State.

To prove the fraud, the Solicitor General offered as a witness for the plaintiff, a collector of arrearages, appointed under the act of 1793, to collect monies due from the delinquents to the State, and who is thereby allowed 8 *per cent.* upon the amount of cash and certificates by him paid into the treasury.

The case of *Dixon and others* v. *Cooper*, in support of the admissibility of the witness, was cited from 3 Wilson, where it is determined, that a factor who sold for the plaintiff and was entitled to one shilling in the pound, was a competent witness to prove the contract of sale.

Henderson, for the defendant, contended that the witness was incompetent.

By the Court. The rule of law is, that unless the witness be interested in the event of the suit, he shall be admitted; except in those cases, which upon their own circumstances, have been differently established by solemn decisions.

This witness is directly interested in the event of the suit, since his commissions must be measured by the amount of the recovery against the defendant, which therefore he is concerned to enhance. The case cited from Wilson is an exception to the general rule arising from necessity and the usage of trade; the factor is concerned both for the vendor and vendee, and his testimony may be resorted to by both

parties, in case of any dispute. He is an agent by whom alone the sale can be proved; but the collector is not necessarily acquainted with the fraud, much less is he exclusively so, since other witnesses have already spoken to it.

NOTE.—But it is no objection to the competency of a witness that he is attorney for the plaintiff, and intends, if the debt sued for be recovered, to charge a commission for receiving and remitting the money. *Slocumb* v. *Newby*, 1 Murph. Rep., 423. See also *Norwood* v. *Marrow*, 4 Dev. & Bat., 442.

ANONYMOUS.—Page 6.

A master in equity cannot act as a solicitor in his own court, and a bill filed by him will be dismissed.

IN EQUITY.—Motion to dismiss an original bill in Equity which had been drawn by the Master of the Court, and signed by him as Solicitor.

Henderson, in support of the motion, urged, among other reasons, that such a practice, if tolerated, would have a most fatal effect upon the administration of justice, whose very sources it had a tendency to corrupt; that it was in truth, to constitute the Master Solicitor and Judge in the very same cause, thereby holding out a temptation to iniquitous judgment, irresistible to many men, and certainly dangerous to all. Independent of the evil consequences that would result to the public, from thus giving to the Master the means of multiplying the business of his office, it would be absurd in the highest degree, that the person who filed a bill, should report upon any matter arising out of it; that the counsel who filed exceptions to an answer, should determine upon its sufficiency, and so on, through the many deviations from the first principles of justice, which every step must produce.

He asked what confidence suitors could have in the decisions of a tribunal, where the advocate of one party,

clothed with the power by his official station, was no less concerned in interest, to spread an unfavourable colouring over the adversary's case. That it was the policy of the law in cases of such moment to the citizens, to regard the principle as inflexible, whatever might be the personal character of the individual; and that, as this was the first attempt of the kind he knew of, he trusted the court would check it, so that, having no precedent, it might not furnish an example.

Holland, for the complainant, argued against the dismission of the bill, that it was not anywhere declared illegal for a Master in Equity to practice as a Solicitor, the authority for which is derived under a license from the Judges, and is not revoked by the subsequent appointment of the Master. That it could not be expected that the Master would act as referee in any case where he was Solicitor; the smallest share of delicacy would be sufficient to restrain any person from becoming such; and then the evil effects adverted to would not arise. That even if it were improper, the Court might sustain the bill, and their opinion as to the general rule, would regulate the practice in future.

Macay, J. I am clearly of opinion that the practice of a Master, acting as a Solicitor in the same court, is improper, in whatever light it is viewed. If the proposed remedy be adopted, namely, that the Master shall not act in his own cases, then, he may be disqualified as to every case in court; consequently the office would not exist, to any one purpose of public utility. I think, therefore, the bill ought to be dismissed.

Taylor, J. I entertain no doubt on the general question, but incline to the opinion that it would be the more regular way to take it up upon demurrer, so that the reasons of the order may appear upon the record.

The bill was afterwards withdrawn.

DEN ON DEM. OF BEATTY'S HEIRS v. ———.—Page 9.

The husband of the widow of the lessor of the plaintiff's ancestor, may be a witness for the plaintiff.

The question in this cause was, whether a man who had married the widow of the lessor of the plaintiff's ancestor, was a competent witness in favor of the plaintiff.

By the Court. The witness is free from any objection on the ground of interest, since a verdict for the plaintiff would not advance him a single step towards obtaining possession of the dower, which his wife claims. Whether the petition for the dower be filed against the heir or a stranger, the petition must be equally full in the proof of the marriage and dying seized; and a verdict in the present case merely determines the right of possession, without concluding the parties as to the right itself. By the event of this suit, therefore, the witness cannot gain or lose anything.

SALISBURY DISTRICT, *March Term*, 1799.

DEN ON DEM. OF FARRAR v. HAMILTON.—Page 10.

A sale of land by the sheriff is valid, though he does not return the execution.

Where the notice is to take depositions between certain hours of the day, such depositions shall not be read, unless it appears that they were taken within the time specified.

Where a witness is called by one party and examined to a particular fact, and is afterwards cross-examined by the other party as to the other facts, the party first calling him cannot object to his testimony on the ground of interest.

A mere right of entry cannot be sold or conveyed to another.

This was an action of ejectment, brought to recover pos-

session of a tract of land in Rockingham county, to which the plaintiff claimed title as follows:

A writ was sued out, from the County Court of Rockingham by one Gains, against Nicholas Larrimore, returnable to August Term, 1791, and continued from thence until February Term, 1794, when judgment was rendered for the plaintiff.

A writ of *fieri facias* then issued against the chattels and lands of the said Nicholas, upon which writ the sheriff made a return in these words, "levied on lands, and sold for ten pounds."

The plaintiff then produced a deed from the sheriff to William Lacey, dated 3d February, 1795, and another from the said Lacey to the plaintiff.

The title set up by the defendant was as follows: that on the 13th Sept., 1792, Nicholas Larrimore, for valuable consideration, conveyed the land in dispute to his son Hance Larrimore, who on the 30th May, 1794, conveyed the same to John Hamilton, the defendant.

Though the deed from Nicholas to his son purported to be made for valuable consideration, no proof was made of the payment of any money; on the contrary it appeared that the son's circumstances had been uniformly low, and that he possessed no means of gaining a livelihood, distinct from those furnished by the father.

It was proved that the nominal price of the land, paid by the son according to the deed, was double its real worth, and that the father had been under great anxiety and alarm, by reason of the suit brought against him by Gains: moreover, the father remained in uninterrupted possession of the land until December, 1797, long after the sale by the sheriff, &c.

The material question for the determination of the jury was, whether this deed from the father to the son, under all its circumstances, was fraudulent or not.

It was contended for the plaintiff, that the transaction was attended with all those marks and badges by which fraud is distinguished. 1. The possession not accompanying and following the deed, which was absolute. 2. The near rela-

tionship of the parties. 3. The want of a consideration. —4. The suit pending against the father, at the date of the execution of the deed, concerning the event of which he had expressed so much anxiety, and *lastly*, that all the rest of the property of Nicholas was claimed by his other children; so that this was, in truth, a conveyance of all his property. For the plaintiff were cited the following authorities, Stat. of Eliz., 2 Bac., 604. Twine's case, 2 Rep., 81. 2 Bulstrode, 218. Cowper, 432.

In the progress of the cause, several points of law arose upon which the Court delivered their opinion. The *first* question was, whether the execution upon which the land was sold should have been returned, to complete its validity?

By the Court. The writs of execution, by which lands are made liable to the payment of debts in England, must be returned, because they cannot be executed by the authority of the sheriff alone; in an *elegit* for instance, he must take an inquest according to the statute; therefore a return is necessary, in order to shew that he has acted properly.

But the Stat. of 5 Geo. 2, Cap. 7, though it renders land liable to the same process with chattels for the satisfaction of debts, does not place the writ of *fieri facias* upon the same footing, in this respect, with the *elegit*. It merely enlarges its object, by giving it an extent it had not before, but does not thereby create any necessity for returning it. If lands are to be sold under it, in the same manner as chattels, there is more necessity for returning it in the one case than in the other. That it is not necessary in the latter, Hoe's case, in 5 Rep., is a decisive authority. The neglect of making a return will subject the sheriff to an amercement, but the execution, nevertheless, retains its validity; the same principle extends to all judicial writs, duly executed, where the sheriff is alone competent to complete them.

There is nothing in the act of 1777, sect. 29, which in the remotest degree, warrants a contrary conclusion. The words are, "that all process that heretofore issued against goods, chattels, lands and tenements, shall for the future issue in the same manner; and such as issued only against

goods and chattels shall hereafter issue against lands and tenements as well as goods and chattels." The writ of *elegit* answers the description of the former part of the clause; consequently it may continue to issue; but the superior efficacy of the *fieri facias* has superseded it in practice.

II. That where a notice is given to take depositions, between the hours of ten in the morning, and five in the afternoon, depositions taken under such notice, ought not to be read, unless it appears, that they were taken within the time specified; otherwise the adverse party might be deprived of the benefit or cross-examination, by the depositions being taken before or after the time; at neither of which periods is he bound to attend. This point was mentioned at the bar, to have been so ruled on the last Circuit, by STONE, J.

III. Where a witness is called upon by one party, and examined to a particular fact, as the execution of a note, and is afterwards cross-examined by the other party, as to other facts, the party first calling him cannot object to his testimony on the ground of interest. A party ought not to invalidate his own witness; and it is unreasonable that he should produce a witness, with the means in his power of destroying his credit if he testified against him.

IV. That the plaintiff's title was essentially defective, in as much as Lacey had conveyed the lands without having had possession, and at a time when there was an actual adverse possession against him by Nicholas Larrimore, leaving in Lacey, only the right of possession which cannot be conveyed. Co. Litt., 214.

The jury found a verdict for the plaintiff, subject to the opinion of the court upon the latter point, which, at the instance of the counsel, was reserved; and at the following term MACAY and MOORE, Judges, gave judgment against the plaintiff, upon this ground.

Henderson, for the plaintiff.

Duffy, for the defendant.

NOTE.—Upon the second point, see acc. *Harris* v. *Yarborough*, 4 Dev.

Rep., 166. Upon the last point, see *Slade* v. *Smith*, 1 Hay. Rep., 248, and the cases referred to in the note.

STREET v. CLARK.—Page 15.

A *certiorari* is not grantable to remove a cause from the County Court before trial, especially where the party has the right of appeal, and the County Court has original exclusive jurisdiction.

At the last term, a rule was made on the defendant to shew cause why a *certiorari* should not issue to bring up a cause depending in the County Court of Rockingham.

The affidavit upon which the rule was founded, stated, in substance, that Street had been arrested in Rockingham county, at the suit of Clark, in an action of slander; that a combination to ruin and destroy him, prevailed in that county, in which Clark was most active; that he had been greatly harrassed by him and others: whereby such unfavorable sentiments were excited against him in the public mind, that he verily believed he could not have a fair trial in that county.

By the Court. A *certiorari* ought not to issue where the party has another remedy: in this case another and a more effectual one is provided by law, against the injustice which he may receive, or even imagine, by the determination of the County Court.

Should they refuse an appeal, this court might properly interpose its authority; but it would be transgressing the bounds of its own jurisdiction, to deprive the County Court of theirs, and this, too, without a sufficient ground: for it is certainly presuming too much, upon the belief of a party concerned, that a court of justice can so far forget the solemn sanctions under which it acts, and the high responsibility of its duties, as to be influenced in its decisions, by bad men combined to oppress an individual.

Of this action the County Court has, exclusively, original jurisdiction under the act of Assembly; and this ought first

to be exercised, before the power of this court commences; but in any case, a *certiorari* is improper before a trial, where there is a right of appeal: unless, perhaps, in a case where the County Court assume a jurisdiction which does not belong to them. Rule discharged.

Duffy, for the plaintiff.
Williams, for the defendant.

NOTE.—For the nature, object and effect of a *certiorari* in this State, see *Dongan* v. *Arnold*, 4 Dev. Rep., 99. *Swaim* v. *Fentress*, Ibid., 601. *Betts* v. *Franklin*, 4 Dev. & Bat. Rep., 465.

CRITES v. LANIER.—Page 16.

If a party and his witness are absent, the court will require that the absence of the party be accounted for, before they continue the cause.

A continuance of the cause was moved for on behalf of the plaintiff, who was absent; but from what cause did not appear; his witness had been summoned, as appeared by the return of the *subpœna*, but was also absent.

The Court were of opinion that it was first necessary to account, in some satisfactory way, for the absence of the party himself; and then proof might be received as to the materiality of the witness, as far as it could be made by a third person. That it would be extremely mischievous to continue causes, upon the naked ground of the party and his witness being absent; for he might absent himself and keep back his witness, for the very purpose of delaying the trial: and thereby harrass his adversary at pleasure.

Alexander, for the plaintiff.
Henderson, for the defendant.

NOTE.—See *Wheaton* v. *Cross*, 2 Hay. Rep., 154. *Sheppard* v. *Cook*, Ibid., 241.

TORIS v. LONG.—Page 17.

A full price paid for an article always implies a warranty of its soundness: and in an action on the implied warranty, the plaintiff need not prove the return of the thing bought.

The plaintiff's counsel stated this to be an action founded, 1st, on an express warranty; 2d, on an implied warranty; 3d, on deceit in a sale.

The material parts of the evidence were, that the plaintiff purchased from the defendant a horse for the price of forty pounds, after he had sent an agent to examine whether the color and size would serve to match a horse he had; the bargain was completed, upon the agent's reporting to the plaintiff favorably of the horse's appearance.

He did, however, examine and approve the horse himself: at each examination the horse, being taken out of the plough, had on a blind bridle. The witnesses generally thought that forty pounds were the full value of the horse, had he been sound: though one witness for the defendant deemed him worth fifty or sixty.

It did not appear distinctly from the evidence, whether forty pounds were the separate price of the horse, or, whether they were paid on account of the horse and a negro, jointly sold for two hundred pounds.

Very soon after the delivery, the plaintiff discovered that the horse was totally blind in one eye, and that the sight of the other was considerably impaired: being about to leave the country himself, he directed his agent to return the horse, and demand the money, which was accordingly attempted; but the defendant refused to receive the horse, unless the negro was likewise returned. About five months before the sale, a film had been cut off the horse's eye, since which it was testified that the animal appeared altogether free from any defect in that organ.

Henderson, for the plaintiff. A sound price uniformly implies a warranty of the soundness of the goods sold.—Whether the defect were known to the defendant or not, since it existed at the time of sale, he is under a moral obligation to pay the plaintiff the difference; and courts of justice will endeavor to enforce duties of perfect obligation where no positive rule of society interposes to prevent it.—The progress of sound sense, and the prevalence of moral justice over technical subtlety, are strongly marked in the case of *Pasley* v. *Freeman*, 3 Term Rep. It is also laid dewn in 3 Wooddeson, 199. "Neither is it incumbent on the plaintiff to prove at the trial that the defendant knew the things sold to be of such trivial or inferior worth." The same anthor in the 2d Vol. says "that a fair price implies a warranty, and that a man is not supposed in the contract of sale to part with his money without expecting an adequate consideration."

In point of real justice there is no difference, whether a man receives the money of another on a consideration which happens to fail, or upon the sale of property, which proves to be of less value, by means of a defect, than it was sold for; the principle which enables him to recover in the one case applies, with equal strength, to the other.

Duffy, for the defendant. It does not appear that a full price was paid for the horse; the forty pounds being paid on account of the horse and negro, and if this fact is so found, the foundation of the plaintiff's argument fails, and consequently the maxim of *caveat emptor* applies in all its rigour. Were it otherwise, and the forty pounds were really paid for the horse alone, yet, as the plaintiff was as skilful as the defendant, and had twice examined the horse, once by himself, at another time by an agent, it may be presumed that he knew the defect, and that he now repents of his bargain; in every event he was as likely to know it as the defendant. There was not on the part of the defendant the slightest appearance of fraud, for he was willing to rescind the bargain, and would have done so, had the plaintiff thought proper to return the negro as well as the horse.—

The principles cited from Wooddeson are unsupported by authority.

The Court, in its charges to the jury, said that the last count upon a deceit was incompatible with the two former, which are founded upon promises, and consequently require a different plea. That the ancient way of declaring, in this action, was in deceit; which had been changed for the convenience of adding to the declaration a general count for money had and received. As this was not done in the present case, and as the latter count could not consist with the others, it was only necessary to state the points, upon which the jury ought to be satisfied, in order to find a verdict for the plaintiff.

That no part of the evidence applied to the first count of the express warranty; and the second, could only be established by proof that the price paid for the horse was a full one, and that he was unsound at the time of sale; except the defect was visible and apparent, so that the plaintiff must have known it.

If these facts are made out to the satisfaction of the jury, the plaintiff is entitled to their verdict; nor is it incumbent upon him to prove, in this form of action, that he returned the horse: for if the contract is established, this circumstance will not change it. It might indeed have afforded a presumption that he knew the defect, if he had not directed his agent to return the horse; but having done that soon after the sale, it seems likely that he then first discovered it.

A return would be necessary, if the action had been brought for the price of the horse. In such case the plaintiff must shew that the contract is at an end; but where it still continues open, the object of the suit is damages: the proper measure of which is the difference between the price paid, and the horse's real value.

Verdict for the plaintiff.

NOTE.—See acc. *Galbraith* v. *Whyte*, 1 Hay. Rep. 464; but the rule that a full price implies a warranty has been since exploded. *Erwin* v. *Maxwell*, 3 Murph. Rep. 241.

STATE v. FORSYTH.—Page 21.

If the prosecutor on an indictment had probable cause, though his motives were of the worst kind, he ought not to pay costs.

If the County Court order the prosecutor to pay costs, and at the next term revoke this order, and order the defendant to pay them, although such a proceeding is improper, on an appeal from the last order, the Superior Court will not go into an examination of the fact, if the whole record of the cause has not been brought up.

The defendant had been tried in the County Court, upon an indictment for an assault, and acquitted; and the Court, thinking that the prosecution was malicious, adjudged the prosecutor to pay the costs. At a subsequent term, however, the Court re-considered this judgment, and directed the defendant to pay the costs; from which order he appealed, and now moved that the Court should go into the examination of witnesses who were attending, in order to show that in truth the prosecution was malicious, and that therefore the first determination of the County Court was proper.

But the Court, although they expressed themselves strongly against the practice of a County Court's setting aside their judgment rendered at a preceding term, were of opinion, that they could not with propriety go into the examination, unless the whole record of the cause below had been brought up, and a jury impanelled under their direction to try the issue *de novo*.

That the question of costs did not simply depend upon the motives of the prosecutor, but upon the guilt or innocence of the defendant; which ought first to be duly ascertained. That if the prosecutor had probable cause, though his motives were of the worst kind, he ought not to pay the costs; and it is possible that, upon a trial of the whole case, he might have directed proofs to that point, which may now be excluded, from the nature of the enquiry. That to determine the question upon this appeal, would be to give

judgment upon the incident of a cause, which properly belongs to that jurisdiction which has cognizance of the principal subject matter.

NOTE.—Where the defendant in an indictment is acquitted, or where a *nolle prosequi* is entered, he is bound to pay his own costs and no other.—*State* v. *Whitted*, 3 Murph. Rep., 223. Under the 23rd and 27th sections of the 35th chapter of the Revised Statutes, when a bill of indictment has been found by the grand jury and a *nolle prosequi* afterwards entered, or when the party has been acquitted on any charge of an inferior nature, the court may order the prosecutor to pay the costs where the prosecution appears to have been frivolous or malicious. It has been decided that the inferior offences here spoken of mean such, the punishment of which does not extend to life, limb or member, and the acquittal must be before the petit jury. *State* v. *Lumbrick*, 1 Car. Law Repos., 543. *State* v. *Cockerham*, 1 Iredell's Rep., 381.

DEN ON DEM. OF CRESMAN v. GEORGE.—Page 22.

The judgment of a justice does not bind lands; and if the defendant sell his lands before the levy of a justice's judgment upon them, the purchaser will acquire a good title, though the levy be afterwards returned to court, and the lands be sold under an order of court for that purpose.

This ejectment was brought to recover a tract of land lying in Stokes county; to which the plaintiff claimed title, first, under a grant from the State to Blackburn, dated 3d April, 1780. A deed from Blackburn to Coffee, dated 16th October, 1785; a judgment recovered by the plaintiff against Coffee, before a justice of the peace, dated 14th June, 1795, and an execution issuing the same day; a levy made on the lands in question, on the 30th July, 1795; the execution returned to the County Court, and an order of sale made in September, 1795; a sheriff's deed to the plaintiff, of the lands in question, dated 11th March, 1796.

The defendant claimed title under a deed from Coffee to him, dated 18th July, 1795, which was impeached by the plaintiff on the ground of fraud. The question, for the

opinion of the court, was whether the judgment so bound the land as to prevent Coffee from conveying it independently of any fraud there might be in the transaction, as between him and the defendant?

By the Court. The Legislature has provided that where there is no personal property, whereon to make a levy, the constable shall levy the execution on the real estate, and make return of his proceedings to the ensuing County Court; that an order of the court may direct the sheriff to dispose of the real estate. There would be no necessity for this formality, if the lands were bound by the judgment in the first instance; the constable might proceed to sell, after satisfying himself that there was no personal property; and such a discretion might have been given to him as the sheriff derives under the 29th section of the Court Law. He is there directed to levy upon and sell lands, if, to the best of his knowledge, the defendant has no personal property, or not sufficient to satisfy the execution. If the sheriff were to sell land, though he knew there was a sufficiency of personal property, his sale would unquestionably be good, whatever remedy the defendant might have against him; and the reason is, that the lands were bound by the judgment, and the writ gives him authority to sell. The sale of the constable under the act of 1786 would be merely void, since the execution neither gives him power to sell, nor does the justice possess competent jurisdiction. Whether a defendant, whose lands are levied upon by a constable under the judgment of a justice, is at liberty to sell after the levy, is a question worthy of consideration; but as the sale in this case was made twelve days before the levy, the question does not arise.

It is also highly reasonable that lands should only be bound by a proceeding more solemn than that of a justice's judgment, the existence of which is not to be ascertained by any record. The orders of the County Court have sufficient notoriety; purchasers may resort to them, and satisfy themselves what judgments are in force against a person with whom they contract. But if the judgment of every justice

is to operate as a restraint upon alienation, a fair purchaser, whatever may be his anxiety to avoid contention, or diligence to discover the true state of the debtor's affairs, is liable to be dispossessed. It is no immediate security to him that the seller's means are ample, or that he had retained sufficient to discharge the debt, for the judgment, if it attaches at all, binds every part of the land; as well that which is sold, as that which is retained. Verdict for the defendant.

Henderson, for the defendant.
Duffy, for the plaintiff.

YARBOROUGH v. BEARD.—Page 25.

If a deed be executed by an attorney, his power, or a copy of it, must be produced.

A certified copy of an instrument required to be recorded is sufficient evidence for the party when the original is lost, and complete evidence for strangers. But as to instruments not required to be recorded, the register's certificate is of no validity.

This was an action of trespass *quare clausum fregit*, brought to try the title. Plea, *liberum tenementum*. The plaintiff claimed title under Adlai Osborne, as attorney for the trustees of the University, and his deed, as such, was read; a question then arose, whether it was incumbent on the plaintiff to produce the power of attorney constituting Adlai Osborne such, and authorizing him to make a title to lands; and if that were necessary, then, whether, as the original did not belong to the plaintiff, the register's books containing a copy, would be sufficient without other proofs of its being a true copy. Upon which questions,

The Court were of opinion, 1st. That whenever a deed was executed by virtue of a power of attorney, the power, or a copy of it, must be produced; and that as the plaintiff was not bound to have possession of the original, he may

supply its absence with the next best evidence. 2d. That when an instrument of writing must be recorded in order to be valid, a copy, certified by the register, is sufficient evidence for the party who ought to have the original, if it be lost; and is complete evidence for a stranger. In these cases, which are specified in the acts of the Legislature, the law gives evidence to the certificates of the register, because he acts by its direction and under its authority; but in other cases, his certificates are no more admissible, than those of a private person; and as registration is not necessary to give validity to powers of attorney, the books cannot be received in the present case. If the person who copied the power into the register's book were present to prove it a true copy, it would be sufficient, upon the common principle of evidence, that if the party has not the original he may give a copy in evidence; if he has no copy, he may prove by parol the contents of the deed.

NOTE.—On the second point, see *Garland* v. *Goodloe*, 2 Hay. Rep., 351.

HILLSBOROUGH DISTRICT, *April Term*, 1799.

JOHN WILLIAMS, SPRUCE MACAY and JOHN LEWIS TAYLOR, Judges.

JOYCE v. WILLIAMS.—Page 27.

A sheriff, who abstains from selling property which it was his duty to have sold, may recover on a written promise of indemnity for not selling if he believed at the time he had no right to sell.

This was an action of assumpsit, founded on a written promise of indemnity made under the following circumstances: The plaintiff was sheriff of Rockingham county, when a writ of *fieri facias* against the property of Nathaniel Williams came to his hands, upon which he made a levy, and

and appointed the day of sale. The plaintiff, who had been but a short time in office, and was but imperfectly acquainted with its duties, was told by the present defendant, who was an attorney, and brother to the defendant in execution, that a sale could not legally take place, unless three actual bidders were present; and was likewise warned by him of the consequences of knocking down the property, unless to a third bidder. This induced the plaintiff to apply to the defendant for his advice professionally, and he then repeated the same information; and that the plaintiff might entertain no doubt of its truth, and to induce him to conduct the sale accordingly, he promised to indemnify him against all damages he might receive, in consequence of discontinuing the sale, in case there should not be three bidders.

The plaintiff then set up a horse, for which the defendant at the first bid offered much more than the value, and no person thinking proper to go beyond this, the horse was consequently withdrawn.

He afterwards set up a negro, for which the agent of the plaintiff in judgment bid the real value at once, but as he was the only bidder, the negro was also withdrawn, whereupon the plaintiff, by the advice and direction of the defendant, and under his aforesaid promise of indemnification, returned on the *fieri facias* "not sold for want of bidders."

For this return, an action was brought against him, as for a false return, and a verdict had against him for £25, damages; he was also convicted upon an indictment for a misdemeanor in office, and fined £25, and was put to other incidental expenses, and sustained other damages, in consequence of the said false return.

The present action was brought on the promise of indemnity to recover a satisfaction in damages for all the loss and injury the plaintiff had sustained by means of the aforesaid return; the defendant pleaded *non assumpsit* and an illegal consideration; and a verdict under the direction of the court, was found against him, at October Term, 1798, for the full amount of damages sustained. The defendant then obtained a rule to shew cause, why the verdict should not be set aside, and a nonsuit entered,

upon the ground that the written promise was within the statute of 23 Hen. 6, cap. 7, and consequently void.

At this term *Duffy* for the plaintiff shewed cause and argued the case on two grounds, 1st. That the promise is neither within the words nor spirit of the statute; for which he cited Beaufage's case, 10 Coke, Croke Eliz., 178, 1 Term Rep. 418. 2d. That if it were within the act, yet it comes within that class of cases, where the plaintiff is induced to do an illegal act, by the false representations of the defendant, and is consequently entitled to a recovery.

Burton, in support of the rule, contended that whenever the condition of a bond, or the consideration of an assumpsit, was to do an illegal act, the bond and the promise were void; that the act in the present case, was manifestly illegal, and had been so pronounced by the judgment of the Superior Court. To prove the first point, he cited 3 Burrows, 1568.

Taylor, J. The 8th section of our act of Assembly of 1777, though expressed in different terms, is substantially the same with the statute of 23 Hen. 6, cap. 7; and it is directed to the same humane and politic ends, namely to guard debtors from the oppression and extortion of the sheriffs and their officers: for if these latter were permitted to take bonds under any latitude of form, from persons in their custody, the most flagrant exactions might be practiced with impunity; and the process of law rendered subservient to the worst purposes: they might conduct themselves to such persons, with lenity or rigour, according to the disposition they met to yield to their demands; and in estimating the price of their condescension they would be cautious enough to indemnify themselves against the possible consequences of their misconduct. But, while the policy of the act is sufficiently vindicated, by the good it has produced, and the decisions which have taken place under it, its object may be effectually attained, without increasing the risques, or multiplying the difficulties of the sheriff's office. The act restrains him from taking obligations from any person in his custody; and the statute of Hen. 6, contains equivalent

expressions; upon which the construction has been, that a bond made to a sheriff, that a party on a *fieri facias* will pay the money into court on the writ, is not within the statute, according to the case in 10 Coke; if such a bond given by a party himself is good, it follows *a fortiori*, that a bond given by a third person is equally so; for neither is in the sheriff's custody. The case of *Rogers* v. *Rogers*, 1 Term Rep., 418, serves to shew that such has been the uniform construction of the statute, and that it relates only to persons arrested on mesne process, beyond which our act of Assembly does not extend.

This verdict is therefore a proper one, unless the undertaking is void at common law; and it is argued for the defendant that it is so, because it is founded on an illegal consideration, viz., that the plaintiff should make a false return. The proposition is generally true that a person cannot be relieved on an action, which is founded on an illegal or immoral act; as where a sheriff promises for a sum of money that a prisoner shall escape, the promise is not good. So if a promise made to a gaoler to pay him money in consideration of his letting the prisoner go at large, it is void, the act being against law; Yelv., 197. The law is the same, where a person promises to pay another money, in consideration of his beating a third person; and, generally speaking, if a person promise to save a minister of justice harmless for doing an unlawful act in his office, the promise is void. 1 Cro., 230.

But the rule of law must be considered with this restriction, that the person who does the act knows it to be unlawful at the time; for where the plaintiff pointed out particular goods, and desired the sheriff to take them on a *fieri facias*, and in consideration that the sheriff would take them promised to indemnify him; this was held a good promise: for the plaintiff showing the goods and requiring the sheriff to do execution, it was reasonable he should save him harmless; 2 Cro., 652. Buller's N. P., 146. In that case, the sheriff committed an unlawful act, and made himself a trespasser; yet as he knew it not at the time, and was urged

by the plaintiff to make the levy, he was entitled to recover.

Such promises are according to the common usage of this country, and are frequently the means of leading to the detection of fraudulent transfers of property. The justice and reason of this case, are likewise strong, on the side of the plaintiff, whose inexperience in office might well incline him to repose in the defendant a confidence by no means unreasonable; since his situation implied skill in the law: and the latter having prevailed upon the plaintiff to make this return, by the united effects of persuasion, advice and a promise of indemnity, ought upon every principle of equity and good faith, to meet the consequences.

Macay, J. The facts of the case are, that the plaintiff was about to do execution on the property of N. Williams, in the accustomed and ordinary way; but the defendant told him it was necessary to have three bidders, and that if he made a sale without three, he would involve himself in difficulty. Having but little confidence in his own knowledge of official duty, and believing that he might falsely confide in the defendant's information, especially when he gave the best proof of his earnestness by a written promise of indemnity, he ventured to make the return, and has deply felt all the consequences.

Now if there were any stubborn principle of law, under which the defendant could shelter himself, it might be lamented, but must nevertheless be obeyed; but I am of opinion that the law, as well as the justice of the case, is with the plaintiff. It is evident, that so far from knowing at the time that he was about to commit an illegal act, he had some foundation for believing it was legal, and this excepts the case from the operation of the general principle. Without going at large into the discussion, I think the verdict is right, and ought not to be set aside.

Williams, J., concurred with the opinion delivered, and mentioned that a case was decided at Halifax, wherein Geddy was plaintiff, upon which occasion the question came before the court, whether a sheriff was entitled to recover

on a promise of indemnity, and the court were of opinion that he was.

Rule discharged.

NOTE.—See the case of *Denson* v. *Sledge*, 2 Dev. Rep., 136, where it was held that a promise to indemnify a sheriff for neglecting to levy a *fi. fa.* or for postponing its execution was bad; though the indemnity would have been good, if it had been for levying a *fi. fa.* against A. upon goods in the possession of B.

STATE v. QUINNERY.—Page 33.

If an erroneous judgment be rendered on a plea in abatement, the defendant may either appeal from it or plead in chief, and upon a second erroneous judgment assign errors upon the whole record.

The recognizance, on a charge of bastardy, to appear at the County Court, must be taken before two justices.

This was a writ of error brought to reverse a judgment rendered in the County Court of CHATHAM. The defendant had entered into a recognizance for the appearance of Mask, to abide the order of the County Court on a charge of bastardy; and Mask failing to appear, a *scire facias* was sued out against the defendant, to which he pleaded in abatement, that the recognizance was taken by a single justice, whereas the act of Assembly requires the presence of two. Demurrer and joinder. The County Court gave judgment that the defendant answer over; whereupon he pleaded *nul tiel record* and a surrender, to the latter of which pleas, a replication was entered, that there was no record of the surrender; demurrer and joinder; upon the argument of which, the County Court gave judgment for the plaintiff. The errors were assigned on both the judgments of the County Court.

Williams, for the defendant in error. When the County Court pronounced judgment upon the plea in abatement, if the plaintiff in error was dissatisfied with it, he ought to have appealed, or should have prosecuted a writ of error

upon that judgment; having failed to do so, but making his election to plead in chief, the merits of the first judgment ought not now to be taken into consideration.

But if this point should be against me, I contend, secondly, that the judgment given upon the plea in abatement was strictly legal. The act of Assembly does not require the recognizance to be entered into, before two justices; it is satisfied by the examination being had before two; and the mere form of taking the recognizance is a ministerial act which any one justice may perform; 2 Hawkins, 84, 85.

Norwood, for the plaintiff in error, was stopped by the court.

By the Court. That which may be pleaded in abatement, cannot afterwards be assigned as error, because it was the neglect of the party not to avail himself of the defect by plea. But if an erroneous judgment be rendered on a plea in abatement, the defendant may either appeal from it, or plead in chief, and upon a second erroneous judgment assign errors upon the whole record. A writ of error will not lie upon an interlocutory judgment, the words of the writ being "if judgment thereof be given," which signify final judgment. The argument for the defendant goes too far; for if it be well founded, it proves that a subsequent erroneous judgment cures the errors of a former one, which would be absurd.

As, then, this error is properly assigned, the only question is, whether it be sufficient to reverse the judgment? The act of Assembly constitutes two justices a court, for the special purpose of examining the woman upon oath, concerning the father of a bastard child, and adjudging that person the reputed father, whom she shall so accuse. Though it does not expressly require the same two justices to bind the man over, yet it is a part of the same proceeding, and must be implied in order to satisfy the subsequent part of the clause, which subjects the reputed father to stand charged with the maintenance, as the County Court shall order.—The words of the clause next following shew that such was the intention of the Legislature, for thereby they extend the

powers of the said two justices to binding over a person charged with having begotten a bastard child not then born. It is not reasonable to suppose that a distinct clause should be inserted for the purpose of giving this power, in a case where the child was not then born, if it had been omitted in the other, where the child might have been already chargeable on the parish. If this is the true construction, then taking a recognizance is in this instance a judicial act, since a discretion must be exercised with regard to the sum, the circumstances of the party, and the probability of his remaining in the county, to answer the charge and obey the order of the court. The whole is a special authority confided to two justices by an act of Assembly, and must therefore be jointly exercised. As we believe the judgment to be erroneous for this cause, it is unnecessary to examine the second error assigned.

Judgment reversed.

BORRETTS v. PATTERSON.—Page 37.

Awards are to be construed liberally: and in mercantile transactions, not admitting of certainty, nice objections ought not to defeat an award. If that to which the objection of uncertainty is made, can be ascertained by the context, the objection shall not prevail.

The meaning of the rule that an award must be mutual, is that the thing awarded to be done shall be a final discharge of all future claims by the party in whose favor the award is made against the other for the cause submitted.

After argument in this case by *Williams* for the plaintiff and *Duffy* for the defendant, and time taken for consideration, the case was stated and the opinion of the court delivered by TAYLOR, J., as follows: This is an action of debt upon an arbitration bond; oyer of the condition is craved, which is set out on the record, and is in these words: "The condition of the obligation is such, that whereas in the years

one thousand seven hundred and eighty-three and eighty-four, they, the above Bell Smith & Co. and William Borretts, did, in consequence of some previous consultations and conclusions, send by sundry conveyances as well by sea as land, goods, wares and merchandises, to the care, management and disposal of the said James Patterson, to a considerable amount, and whereas there is a controversy in regard to the statement and settlement of those affairs; and whereas all parties mutually agree that the said dispute shall be wholly put to arbitration, and have accordingly chosen John London and Amasiah Jocelyn, with an umpire to be chosen by them, if necessary, arbitrators finally to enquire and decide for each and every of the parties, relative to the matters before recited; now, therefore, if the said James Patterson shall and do ultimately, decidedly and finally, abide by and conform to the sentence, judgment and decision of the aforementioned arbitrators, and confirm their award with regard to the premises, and shall in future at all times acquiesce in the same, and shall accordingly either make payment or receive payment as the case may be, then the aforesaid obligation to be void, &c." To this the defendant has pleaded that no award was made; the replication sets out an award in the following words: "We have examined the matters in dispute between Bell Smith & Co. and William Borretts, and James Patterson of Fayetteville, merchant, and do find that, after fully adjusting the advance on goods, and the respective charges and commissions on the sales and remittances, there remains due on these transactions at their close (sixteenth July, 1784,) to Bell Smith & Co. and William Borretts the sum of £401, 8, 3, from the said James Patterson. If any outstanding debts are made to appear due on the said concern, they are to be allowed against the said balance; provided Mr. Patterson shall make it appear that he hath taken proper means for the recovery in due time, agreeably to law." Upon these pleadings the jury have found a verdict for the plaintiff, and the court have now to decide upon the sufficiency of the award. The objections made against it are, that it is not certain, for it directs nothing to

be paid: that it is not final, since it opens a new source of litigation; or at best, leaves the parties as they were before the reference: and because it does not appear whether the outstanding debts were due before the reference, whereas they may possibly have accrued since; that it does not appear who is to ascertain whether the defendant has used due diligence, and is in consequence entitled to the deduction: and lastly because it is not mutual, inasmuch as it directs nothing to be done by the plaintiff.

There is no subject in the laws upon which ancient cases are more obscure, or convey less exclusive information than awards. To adopt them in the rigorous application of the rules of construction, or to pursue them through their endless subtlety of refinement, would be, in truth, to render awards of no use, in the main purpose of their introduction—re-adjusting the controversies of men, before a domestic tribunal, unattended with expense, trouble or delay. Of this nicety many instances may be adduced; but one will be sufficient to attest it. A submission was to the award of four men by name, so as the same award be made and delivered up in writing by them or any three of them: it required several solemn arguments to convince the court, that these words gave authority to any three of the arbitrators to make the award; they supposing that it could not be the same award unless made by the four. If courts of justice had continued in the practice of scanning awards with such rigid scrutiny, the effect would have been that a mode of trial highly beneficial to mankind must long since have disappeared.

But sound and rational interpretation have at length prevailed; and we are furnished with two rules; one respecting awards in general, in 1 Burr., 277, which is to adopt a liberal construction, in order that awards may answer the purpose for which they were intended: the other is in 2 Atkyns, 501, that in mercantile transactions, which do not admit of certainty, nice objections ought not to defeat awards. Nevertheless awards must have, to a common intent, all those qualities, the want of which is

objected to the present one; but whether that possesses them or not, should be examined in the true spirit of these rules, and of some others established by law, to advance the utility of this mode of proceeding.

As to the objection of uncertainty, it should be noted that the parties to this transaction, submittants and arbitrators, are merchants; amongst whom, to say a sum of money is due, is equivalent to a promise of payment, and is so understood by debtor and creditor; and amongst all persons such an acknowledgment will revive a debt, barred by the statute of limitations: even if the condition of a bond is that a person shall render a fair, just and perfect account in writing of all sums received, yet, if the obligor neglect to pay over such sums, he is guilty of a breach of the condition, Douglas, 382, *Bache* v. *Proctor*. But the terms of this bond are, that the defendant shall acquiesce in, and confirm the award, and make payment if the case may be so: now it is difficult to conceive how he can comply with this condition, and yet refuse to make payment on the award. An award that the one should keep the goods in dispute, paying so much to the other, has been construed imperatively that he should pay; L. Raymond, 612: for if the words of an award have any ambiguity in them, they shall be so construed as to give effect to it. The principle of this submission was, that whoever appeared to be the debtor, should pay; the arbitrators have found who was the debtor, and the consequence must follow.

In the settlement of transactions of this kind, the chief difficulty usually is to fix and ascertain the rule, by which the account shall be adjusted; a merchant and factor are more apt to disagree respecting the commissions, extra charges, and price of the produce remitted, than concerning the amount or price of the goods originally consigned. So many unforeseen events arise out of the mode of doing business, and the circumstances of the country, that although they understand each other in the beginning, the application of some rule is necessary to the intervening circumstances.—When, therefore, by the interposition of friends, they have

ascertained the rule by which their accounts shall be settled, the rest is a mere operation of arithmetic which they themselves can as well perform. So that although the amount of the outstanding debts is uncertain, yet it may be rendered certain by the defendant; to whom alone it was known, and who might consequently have availed himself of this clause, inserted exclusively for his benefit. It does not appear on the face of the award that the arbitrators knew there were any outstanding debts due on the concern; and if there were any, it must now be intended, after verdict, that the defendant would have claimed the benefit of this provision.

On the other hand, if the outstanding debts had amounted to a larger sum than is found due from the defendant, a total silence in the arbitrators respecting them might have worked injustice. The other parts of the clause, such as that the defendant shall make it appear that he hath taken proper means for the recovery in due time, signify no more than the law would have implied without them; that the company should not sustain the losses occasioned by his negligence. But there are authorities which apply with some force against this objection; as in Rolle, 250, an award that one shall pay his proportion which shall appear due upon an account: so in Strange, 903, it is held that if an award is as final as the nature of the thing will admit of, it is sufficient; as where Marshall, at the instigation of Knightly, brought a *qui tam* action against Phillips, in behalf of himself and the poor of the parish; Phillips for himself, and Knightly in behalf of Marshall, submitted by bond all matters in difference between the parties to arbitration. It was awarded that Knightly should execute a covenant to indemnify Phillips against all costs, damages and expenses which happen by means of any further proceedings in the *qui tam* action; the objection taken to this award was, that it was not final, not putting an end to the suit, but only giving a new action of covenant. But it was held that the award was sufficiently final, and that at any rate it was not competent to the defendant to make this objection, and that the arbitrators had done everything they could do to make their award final. To this may be

added the case of *Beale* v. *Beale*, 3 Vent., 65, where it was awarded that one party should pay his part of the expenses of the voyage, and allow on account his proportion of the loss which should happen to the ship during the voyage; this was held good because the expenses and the loss might be ascertained by calculation.

It is another rule in the construction of awards, that if that to which the objection of uncertainty is made, can be ascertained either by the context of the award, or from the nature of the thing awarded, or by a manifest reference to something connected with it, the objection shall not prevail. This rule furnishes an answer to the objection, which states that it does not appear when the debts accrued. Undoubtedly the arbitrators would have exceeded their powers, if the debts had accrued after the submission; but that is impossible, from the nature of the transaction, because it appears on the face of the award that the connection closed the 16th July, 1784; consequently all the debts must have accrued before that time.

The meaning of the rule as to the want of mutuality is, that the thing awarded to be done shall be a final discharge of all future claims by the party in whose favor the award is made, against the other for the cause submitted. The recovery in this action is an effectual bar against any future claims the plaintiff can set up on account of this award, the judgment here being for the penalty of the arbitration bond. For these reasons we think there must be

Judgment for the plaintiff.

NOTE.—See *Blackledge* v. *Simpson*, 2 Hay. Rep., 30. *Bryant* v. *Milner*, Conf. Rep., 313. *Carter* v. *Sams*, 4. Dev. & Bat. Rep., 182. *Duncan* v. *Duncan*, 1 Iredell's Rep., 466.

HYNES v. LEWIS'S EX'RS.—Page 44.

Whether slaves, to whom the wife has a right in remainder, vest in the husband if he die during the coverture, without having reduced them to possession. Qu?

Upon an action of detinue, tried at April Term, 1796, a verdict was found, subject to the opinion of the court upon the following case:

That Charles Lewis duly made his last will and testament, on the 21st September, 1779, wherein, after sundry devises and dispositions of his property, the will proceeds as follows: "My will and desire further is, that on the death of my wife, all the rest and residue of my estate not herein otherwise disposed of, may be divided into eight equal parts or portions, and one of those parts or portions I give, devise and bequeath to each of my sons and daughters respectively, or their heirs, viz.: John Lewis, Charles Lewis, Howel Lewis, Robert Lewis, Elizabeth Shannon, Ann Taylor and Frances Lewis, and the other eighth part or portion thereof to the sons and daughters of my son James Lewis, deceased, and to their heirs or legal representatives respectively." The appointment of executors then follows. The testator died on the —— day of ———, 17—, and the will was admitted to probate on the 21st December, 1779. That Robert Lewis, on the —— day of ———, 1779, intermarried with Frances Lewis, daughter of the testator Charles; that on the 2d September, 1780, the said Robert Lewis made his last will and testament, wherein (*inter alia*) he directs that all his personal property be equally divided among his wife and children; his wife's proportionable part to be for her use during her natural life, and to be disposed of by her in any manner she should think proper, during that period, to such of his children as she pleased, and then each child's part to be to them and their heirs forever. That the said Robert Lewis died on the —— day of ———, 1780, and after-

wards, on the —— day of ———, 1782, Mary Lewis, widow of Charles Lewis, died; upon whose death, the executors of Charles proceeded to make a division of the negroes and other estate bequeathed by his will, and the part allotted to Frances Lewis in the said will was set apart, in which were contained the negroes specified in the declaration, and that the said Frances then took them into possession, with the consent of Charles Lewis's executors. That on the —— day of May, 1790, the said Frances Lewis, having been in possession of the said negroes from the time of the division, and being then in the possession of them, intermarried with the plaintiff, Thomas Hynes, and on the 10th October, 1790, the said Frances died, the said Thomas Hynes having a continual and uninterrupted possession of the negroes from the time of his marriage, until his wife's death. That in 1792, the said Thomas Hynes delivered all the said negroes to Robert Lewis's executors, for the use of Robert's children, but without prejudice to his, Thomas Hynes' right, in which manner the said executors accepted them; and that afterward, and before the institution of the suit, Thomas Hynes demanded the said negroes from the executors, who refused to deliver them; upon the whole, &c.

This case was fully argued by *Potter* for the plaintiff and *Norwood* for the defendant; but as the principal points relied upon are noticed in the opinion of the court, their arguments are omitted. After time taken for deliberation,

Taylor, J., delivered the opinion of himself and Macay, J., (Williams, J., being absent from sickness,) as follows:

It is found by the special verdict that in the year 1782, upon the death of Mary Lewis, widow of Charles Lewis, a division was made of the negroes bequeathed by Charles, and that those mentioned in the declaration were allotted to Frances Lewis, then a widow, who immediately took them into possession. That in May, 1790, being so possessed, she intermarried with Thomas Hynes, the plaintiff, who likewise became possessed of the negroes, and that in October, 1790, Frances, then Frances Hynes, died. It is further found, that in 1792, the plaintiff delivered the negroes to the

defendants, but without prejudice to his right, and that in 1793, they refused to deliver them when demanded by him. So far the plaintiff's title is unattended with any difficulty.

But the defendants say that Charles Lewis, having bequeathed the ulterior remainder in these negroes, to his daughter Frances, during her coverture with Robert Lewis their testator, and the said Charles Lewis having also died, during the coverture, the title became vested in Robert, immediately upon the assent of the executors, and of course transmissible to his representative.

The question therefore for the opinion of the court is, whether Robert Lewis did become entitled to these negroes, without having reduced the same into his possession during the coverture? It may be premised that, as negroes are considered by our law personal property, and as that is governed by certain general rules, in regard to its division, succession, and the rights that men may hold in it, this species of it, in common with every other, must necessarily be obedient to the like principles. Whatever necessity there may be that this sort of property should be regulated in a manner peculiar to itself, or that questions concerning it should be determined with a view to the exigency of men's affairs; yet it is obvious that such alterations, accommodated to the nature of the property and the circumstances of the country, can only be made by legislative authority. In the discussion of legal rights, courts of law are bound to apply strict legal principles, and the hardship in a particular case must be overlooked, in the greater benefit resulting to the community, when certain known rules are made the test of men's rights, instead of suffering them to fluctuate in the dangerous uncertainty of private speculation.

The rule of law which ascertains what property the husband acquires by marriage, is so clear and well settled, that no difficulty could arise from it in the present case; but the argument has turned upon the application of that rule to property circumstanced like the present. That rule declares that the personal property of the wife in possession becomes, by the marriage, absolutely vested in the husband; that the personal property of the wife in action does

not vest in the husband, unless he reduces it into possession during the coverture. If he die without doing so, and the wife survives, it is absolutely hers; if she dies, he has no other method of deriving benefit from such property, than by taking out letters of administration; Co. Litt., 351, *a*. Hence it is important to ascertain the respective boundaries of what is termed property in possession, and property in action; especially as it is argued for the defendant that choses in action, strictly speaking, must be confined to debts upon bond, contract, and the like; to damages for the non-payment of a debt, or the specific debt itself; excluding by this definition, goods, plate, deeds and writings, as well as negroes.

All personal property is divided into things in possession, and things in action; the first corresponding with the *jus in re*, the latter with the *jus ad rem*, of the civil law. Things in possession, are used in contradiction to such as are not in actual enjoyment; and which, to become so, must be recovered by suit, whether they consist of money or specific chattels. Thus it is said in 2 Blacks., 439, "Chattels personal or choses in possession, as money, jewels, &c." Consequently if this money or these jewels were not in possession, they would be chattels personal or choses in action: accordingly an action of debt was anciently brought to recover a specific chattel, as well as a certain sum of money; the only difference being, that the defendant was charged in one case with owing, in the other with detaining; and the action was equally maintainable, whether a chattel was bailed to a defendant, who refused to restore it, or whether a man had contracted to deliver a specific chattel; Gilbert's Action of Debt, 400. The same division of chattels in possession and chattels in action, is recognized in Roll., 342, and in 4' Rep., 65. It seems, therefore, that when a person's deeds or goods, and consequently negroes, are in the possession of another, and he can only be restored to them by suit, he has a chose in action, precisely to the same extent, as if his demand arose from a bond or promissory note.

The argument that these negroes were vested in Frances

Lewis during the coverture, and were therefore transmissible to Robert's representatives, is fallacious; for money in the hands of a trustee for a feme covert, is vested in her; yet if the husband dies without disposing of it, it survives to her, 1 Vern., 161. Rent that accrues during the coverture, upon a lease made by the husband and wife of the wife's land, is vested in her; yet she shall have it, if she survives her husband, 1 Roll., 350. Many interests may be vested in the wife, which nevertheless do not belong to the husband; to complete his title, there must be a vesting in possession, as well as in interest, In this respect, the subject bears some analogy to a case of real property, where a remainder in fee is limited to a feme covert after an estate for life: during the particular estate, it is vested in her and is transmissible to her heirs; but if the particular tenant survives the wife, the husband shall not be tenant by the curtesy for want of a seizin in fact.

All that vested in Frances, during the coverture, was an undivided eighth part of Charles Lewis's negroes after the death of his widow: of what negroes this part should consist, was not ascertained until the division, which took place after Robert's death; so that in fact, until that time, no specific negroes vested in Frances. She had a claim upon the *residuum*, which, it is true, the widow of Charles Lewis could not defeat by any act of hers, and so far her right was vested; yet this is rather an equitable than a legal right, for the protection of which in a court of law, during the life of the widow, it would be difficult to devise an adequate remedy. Considered as a trustee for Frances, she might have been compelled, in a Court of Equity, to deliver in an inventory of the property, whereby it might be secured against any disposition of hers, calculated to defeat the remainder; but no case has occurred where such a right as this has been asserted in a court of law during the life of the first taker; 2 Fearne, 46. Then, the claim of the defendants amounts to this, that the wife, during the coverture, became entitled to an equitable right in remainder, to an undivided eighth part of Charles Lewis's estate: that the husband, their testator,

neither did nor could reduce the same into possession, during the coverture, and that he died without making any assignment of it, his wife surviving him. Now chattels of a mixed nature, partly in possession and partly in action, which happened during the coverture, the wife shall have, if she survives; Co. Litt., 351, *a*. The law is the same, if she becomes entitled to a distributory share of an intestate's estate, which, never having been reduced into possession by the husband, survives to the wife, Shower, 25. The reason of those cases, would seem to apply with more effect to the present one, which is the claim of a mere possibility.

Some of the cases, which have been cited for the defendant, shall now be briefly noticed; and an attempt made to point out wherein they appear to us defective in their application. By the case of *Cary* v. *Taylor*, in 2 Vern., 302, it is to be observed that nothing is decided. The question was whether a distributory share should be consider as an interest vested, so as to belong to the husband, though his wife dies before an actual distribution, and he dies without administering upon her effects; and for the administrator of the husband it was argued that it should be considered as a legacy assented to, and consequently vested in the husband, without administering to his wife. In this latter case, the husband survived the wife: a circumstance which rendered his claim to the distributory share subject to the operation of principles inapplicable to the present case. The husband has a prior right to administer upon his deceased wife's effects, and is not compellable to distribute them, as other administrators are, but is entitled to the wife's choses in action, when recovered, for his own benefit. This was declared to be the law by the Stat. 29th Car. 2, although, before that time, doubts were entertained respecting it. Now, as the right to administer follows the right to the property, it is of course transmissible to the husband's next of kin, and the administrator *de bonis non* of the wife is considered as a trustee to him; Co. Litt., 351. And in conformity to this rule, the consequences that respectively follow, from the hus-

band's surviving the wife or otherwise, are exemplified in the two cases of *Fowke* v. *Leven*, 1 Vern., 88, and *Pheasant's* case, 2 Vent., 340. But in the case under consideration, Frances Lewis, by surviving her husband, became entitled to her own choses in action which he had not reduced into possession. The case of *Packer* v. *Windham*, Finch's Rep., is where money and jewels belonging to the wife were laid hold of by the court of chancery during the coverture as a caution or pledge, till the husband made a provision for his wife. The husband died first, and afterwards the wife without issue, and it was resolved that the money belonged to the husband. But that this decision was to conform to the established principle, that the wife's choses in action should belong to the husband only when reduced by him into possession, is manifest from the reasoning of the court; for they consider that the money was always in the husband's possession, and as only remaining in court, subject to the wife's equitable claims. The only thing proved by the case of *Molesworth* v. *Molesworth*; 3 and 4 Brown's Rep., is, that where there is a devise to trustees to pay to one for life and then to pay a legacy to another, the latter is a vested legacy and transmissible. It may be vested and of course transmisible, but, to belong to the husband, it must, as has been observed, be vested in possession. The cases cited from 1 Atkyns, 458, and 1 Peere Will., 378, do not apply in a different manner from those already observed upon, except that by the first it is admitted that a legacy unreceived during the coverture, is a chose in action which the husband may recover and enjoy by administering to his wife.

Upon the whole, we are of opinion, from the consideration we have been able to bestow on this case, that the plaintiff is entitled to recover. But as Judge Williams, who is now absent by reason of sickness, does not coincide with us, and as it is a case of great concern to the parties, upon the points of which we are not aware that any determination has taken place; we think it better that the judgment should be postponed to the next term, in order that a case which is likely to settle an important rule of prop-

erty, may be decided with all the advantage it can derive from a more deliberate examination.

NOTE.—See *Lewis* v. *Hynes*, 1 Hay. Rep., 278, and the note thereto; also, *Neale* v. *Haddock*, 2 Hay. Rep., 183, and the cases referred to in the note to that case, which establish the law to be, that where a wife has a remainder in slaves, and the husband dies during the coverture and before the slaves have been reduced into possession, the slaves shall belong to the wife instead of going to the husband's representatives. See also *Whitehurst* v. *Harker*, 2 Iredell's Eq. Rep., 292.

EDENTON DISTRICT, *October Term*, 1799.

JOHN HAYWOOD and JOHN LOUIS TAYLOR, Judges.

STATE v. HASSET.—Page 55.

On an indictment for perjury, the person against whom the defendant testified, and upon whose testimony he was convicted upon a charge for an assault and battery, is a competent witness.

This was an indictment for perjury, charged to have been committed by the defendant, in giving evidence on a trial between the State and George Wynn, for an assault and battery committed on the defendant. George Wynn, the prosecutor, was offered by the Attorney General to prove the perjury.

Slade, for the defendant, objected to his being sworn, on account of the strong bias which he must necessarily feel, to procure the conviction of a person by whom he had been prosecuted, and through whose means he had been found guilty and fined. That from such impressions the mind of a witness ought to be perfectly free, otherwise the facts he relates will be either distorted, or so discolored by the resentment which acuates him, as to be equally adverse to the discovery of truth. He cited the case of *Rex* v. *Whiting*, 1 Ld. Ray., 396, where it was decided, that upon an information for a cheat in obtaining by imposition a note for £100,

instead of £5, the person thus imposed upon, was not admitted to give testimony, because he was in some measure concerned in the consequences of the suit; since a conviction would have a tendency to discharge her from the payment of the £100. That it is there also expressly ruled by the court, that the case was not distinguishable from perjury or forgery, where the party interested in the deed or prejudiced by the perjury, shall not be admitted to prove the perjury or forgery. He also cited *Rex* v. *Nunez*, Str., 1043, where the authority of the former case was recognized and followed: that was an indictment for perjury committed in an answer in chancery, wherein the defendant denied an agreement charged in the bill, not to sue a note given to him by the prosecutor, who, being called upon to prove the agreement, was rejected as incompetent. The same doctrine is also established in *Watts's* case, Hardr., 331, where it is laid down, generally, that no person who is a loser by the deed, or who may receive any advantage by the conviction of the defendant, can be a witness against him in an indictment for forgery. He argued, that the same principle is properly extended to perjury, where the prosecutor may consequentially derive a benefit from the conviction of the defendant.

By the Court. The cases cited by the defendant's counsel, were relied upon in the case of *Abrahams, qui tam* v. *Bunn;* 4 Burr, 2255, and were all, upon argument and consideration, overruled. The rule laid down in that case was, that the question in a criminal prosecution, being the same with a civil cause, in which the witness was interested, went generally to his credit; unless the judgment in the prosecution where he was a witness, could be given in evidence in a cause in which he was interested: in the latter case, it would be an objection to his competency. If this rule be correct, (and it seems to have been so considered ever since,) its application to the present case leaves no room to doubt the competency of the witness.

Objection overruled.

NOTE—See *State* v. *Wyatt*, 2 Hay. Rep., 53, and the cases referred to in the note.

HALIFAX DISTRICT, *October Term*, 1799.

JOHN HAYWOOD and JOHN LOUIS TAYLOR, Judges.

SMITH v. WEAVER.—Page 58.

If an action of trespass be brought for killing a slave, pending an indictment for the same fact, and the indictment be first tried and the defendant acquitted of the felony, that proves that the trespass never was merged, and the plaintiff may proceed to his action.

This was an action of trespass for killing a slave, the property of the plaintiff, who had been hired to the defendant. The jury found a verdict for the plaintiff, under the direction of the court, stating to them that in point of law the defendant was liable, if the facts charged in the declaration were established by satisfactory evidence. The objection taken in the trial was, that the offence charged amounted to felony, the civil remedy for which, although the defendant had been indicted and was acquitted, was nevertheless merged in the crime. And now upon a motion for a new trial it was argued by

Browne, for the defendant. I contend that the plaintiff is not entitled to maintain this action, and that it will lie, by the general principles of law, yet the writ in this case was prematurely sued out, being done before the determination of the criminal prosecution against the defendant. By the act of 1774, cap. 31, the offence of killing a slave, the property of another, if committed under such circumstances as, in the case of a freeman, would have amounted to murder, was punishable upon the first conviction, with twelve months imprisonment, and by paying the owner the value of the slave: upon a second conviction the offender was punishable with death. By the act of 1791, cap. 4, the punishment is altered to death upon the first conviction, and the crime is placed in all respects upon the same footing with the murder of a freeman. Thus if the offence amounted to

murder, the civil remedy is merged in the felony; if it amounted to any inferior species of homicide, the offender must be absolutely acquitted upon the indictment, and could not have been found guilty in this action, where the killing must have appeared to the jury wilful and malicious; and, if so, the offence is felony. The policy of the law in this respect is wisely directed to the public security, by compelling those who have been injured by means of a felony, to prosecute the offender criminally. But if the party may obtain a recompense by a civil action, very many offences will remain unpunished. If it shall be answered that the party plaintiff has in this case prosecuted criminally, and thereby entitled himself to sue, yet at all events, he should have waited the final determination of the charge, before he instituted the suit; 1 Bac. Abr., 64, *in notis*.

Baker, for the plaintiff. The rule laid down on the other side is an useful and politic one, when applied to cases within the reason of its operation, but manifestly leads to unjust consequences, when extended to others which are not intended to be affected by it. The law has in view, that there shall be every reasonable motive to incite men to the prosecution of those by whom they have been injured, by an act amounting to felony, in order that the public justice may be satisfied; but when this is done, there is neither reason nor justice in withholding from the injured party the satisfaction which the offender is able to make him. If a person guilty of felony be pardoned or burnt in the hand, he is afterwards liable to the action of the individual; 1 Bac. Abr., 64. Why should he not be equally liable after an acquittal, where the prosecution has been *bona fide?* The jury have found the trespass and assessed the damages, and the court will not disturb the verdict, unless some plain rule of law demands it. As to the suit having been brought before the determination of the criminal prosecution, that is right or wrong according to the event. If a conviction had taken place, then the court would have made the payment of the value of the slave a part of their judgment, and of course the present

suit would not lie; but as the defendant was acquitted, it does not signify when the suit was brought.

TAYLOR, J. It is not necessary to enquire what would have been the legal consequences as applied to the present suit, if a felony had been committed; because that fact, having been properly put in issue upon a criminal prosecution, has been negatived by the finding of a jury. The plaintiff in prosecuting for the felony has done all that the law requires of him, and the acquittal of the defendant could be no broader than the charge; consequently the trespass remains. I do not think it necessary to decide whether, in any case of trespass, it would be a good defense that the facts proved amounted to felony, although the charge in the declaration was of a trespass merely; because I am clearly of opinion, from the circumstances of this case, that the verdict is properly found.

HAYWOOD, J., assented.

Motion denied.

NOTE.—The doctrine of the merger of trespass in felony does not apply in this State. *White* v. *Fort*, 3 Hawks Rep., 251.

MITCHELL v. BELL.—Page 61.

NOTE.—See S. C., reported in Conf. Rep., 17.

STATE v. KNIGHT.—Page 65.

The Legislature of this State cannot define and punish crimes committed in another State.

The defendant was indicted under the 4th section of the act of 1784, cap. 25, the words of which are, "And whereas there is reason to apprehend that wicked and ill disposed persons, resident in the neighboring States, make a practice

of counterfeiting the current bills of credit of this State; and by themselves or emissaries, utter or vend the same with an intention to defraud the citizens of this State; Be it enacted, &c., that all such persons shall be subject to the same mode of trial, and on conviction, liable to the same pains and penalties, as if the offence had been committed within the limits of this State, and be prosecuted in the Superior Court of any district of the State." Being found guilty by the jury, he was now brought up to receive judgment.

Taylor, J. As the prisoner was unassisted with counsel at his trial, we have felt it to be our duty to examine whether this indictment and conviction be warranted by a just application of the principles of criminal justice, and of general jurisprudence; and an enquiry having produced great doubts as to the validity of this section of the act, independent of the indefinite terms in which it is expressed, we have thought it right that this judgment should be arrested. The States are to be considered, with respect to each other, as independent sovereignties, possessing powers completely adequate to their own government, in the exercise of which they are limited only by the nature and objects of government, by their respective constitutions, and by that of the United States. Crimes and misdemeanors committed within the limits of each, are punishable only by the jurisdiction of that State where they arise; for the right of punishing, being founded upon the consent of the citizens, express or implied, cannot be directed against those who never were citizens, and who likewise committed the offence beyond the territorial limits of the State claiming jurisdiction. Our Legislature may define and punish crimes committed within the State, whether by citizens or strangers; because the former are supposed to have consented to all laws made by the Legislature, and the latter, whether their residence be temporary or permanent, do impliedly agree to yield obedience to all such laws, as long as they remain in the State: but they cannot define and punish crimes committed in another State, the citizens of which, while they remain there, are bound to regulate

their civil conduct only according to their own laws. If our Legislature does not rightfully possess such a power, its assumption and exercise should be carefully avoided, lest our own citizens should be harrassed under the operation of similar laws enacted in other States; whereby acts, against which the policy of this State did not require that any punishment should be denounced, may be punished in other States with exemplary severity. This may happen in relation to those acts which are not criminal in the State where committed; but the consequences will be far more serious, if the acts are originally criminal; for then a conviction and punishment in a State having no right to entertain jurisdiction of the offence, and consequently to inflict the punishment, will be disregarded in the courts of that State where the offence arose. The crime described in this section of the act is no doubt punishable in Virginia as a common law misdemeanor, and although the punishment may be less severe than that prescribed by our act of Assembly, yet it is better to yield up the offender to the laws of his own State, than, by inflicting a punishment under the exercise of a doubtful jurisdiction, furnish a precedent for a sister State to legislate against acts committed by our own citizens, and within the limits of our own territory. I am authorized by Judge Haywood, to declare his concurrence in the opinion, that the prisoner be

Discharged.

PLUMMER v. CHRISTMAS.—Page 67.

In the case of paper not negotiable, the law is not so strict as in the case of negotiable paper, but the assignee must apply for payment in a reasonable time, and also give notice of non-payment in a reasonable time, and on failure of giving such notice, if a loss really happens, the assignee must sustain it.

Willis executed a bond to Christmas, to secure a debt due

to the latter, and gave him a mortgage upon a tract of land. About five years before the institution of this suit, Christmas assigned the bond to Plummer, who, being unable to procure payment from Willis, brought the present action to recover the amount.

By the Court. Where a negotiable paper is assigned, the transaction is to be regulated according to the laws of merchants; by which the assignee is bound to apply for payment within a reasonable time: and if that be either refused or delayed, he must give notice to the endorser, who is not liable unless these conditions be complied with. But with respect to unnegotiable papers, the law is otherwise, being constructed upon the principles of equity and natural justice; for it is right that he should suffer by the loss, whose misconduct has occasioned it. But where no loss really has happened, the assignee may recover the debt, although he has failed to give notice of non-payment in reasonable time. He may return the paper, when he cannot procure the obligor to pay it. In the present case, no loss of the debts which must fall either upon one or the other of the parties, has happened: for though the obligor is insolvent, yet the assignor is safe by means of the mortgage.

Verdict for the plaintiff.

NOTE.—See *Pons* v. *Kelly*, 2 Hay. Rep., 45, and the cases referred to in the note thereto.

WILMINGTON DISTRICT, *November Term*, 1799.

JOHN HAYWOOD and JOHN LOUIS TAYLOR, Judges.

BALLARD v. AVERITT.—Page 69.

If a defendant be arrested on a *ca. sa.* and discharged by the plaintiff's consent the plaintiff cannot have a new execution against him; but if he is arrested, and escape by the neglect or permission of the sheriff, the plaintiff may have a new execution, though the sheriff could not arrest or hold him in custody on the old writ.

On a *sci. fa.* to revive a judgment, if the defendant plead that he was formerly imprisoned for the same debt, the plea is bad for want of shewing how he was discharged.

Scire facias to revive a judgment. Plea, that the defendant had formerly been arrested on a *ca. sa.* for the same debt. Demurrer and joinder.

Jocelyn, in support of the demurrer. The plea relied upon by the defendant, furnishes no legal objection to the present mode of proceeding. It may be true, and yet the plaintiff be entitled to another execution for his debt. To render such a plea available, it is necessary that it should state how, and by what means, the defendant was discharged, after being taken in execution; for it is the plaintiff's consent alone that will destroy the effect of the judgment; 1 Shower's Rep., 174. 1 Salk., 271. Barnes, 373. 4 Burr., 2483. 2 Mod., 136.

Duffy, for the defendant. It is not customary to draw pleas at length, unless required by the opposite counsel; but, for the purpose of deciding on the merits of a plea, the court will consider it as stated at full length, and as containing all the formal parts without which it would be insufficient on a special demurrer. In this view, the demurrer should be applied to the substance, and not the form of this plea; and then it is sustainable.

By the Court. Unless the manner in which a defendant

came out of custody, be stated in a plea of this kind, it is to be presumed that he obtained his discharge by some of those means which still leave the judgment in full force. He may have escaped, or the officer who took him may have suffered him to go at large, in neither of which cases would the plaintiff lose the benefit of his execution. The cases cited are conclusive.

Judgment for the plaintiff.

NOTE.—On the second point, see *Langly* v. *Lane*, 3 Hawks Rep., 313.

BLAKE and GREEN v. WHEATON.—Page 70.

Two partners may draw a note payable to one of them, and the assignment by him will bind the other.

Wheaton and Tisdale, merchants and co-partners in trade, drew a note payable to Tisdale, one of the firm, or order: he indorsed it to the plaintiffs, who brought the present suit against Wheaton, and obtained a verdict.

Jocelyn moved in arrest of judgment, that the note was made payable by D. Wheaton and J. Tisdale, under the firm of Wheaton and Tisdale, to J. Tisdale, whereby the said James became the payee and payor; that the said James could not have maintained a suit to recover the contents of the note; neither can Blake and Green, as his assignees; for he cannot transfer that right to another which he possessed not himself.

By the Court. The paper, on which this suit is brought, should be considered as an authority or power given by both partners to Tisdale, to draw on the partnership effects, in favor of some third person, and as an engagement of the partners that such draft should be paid. This amounts to an acceptance, and places the contract upon the footing of an order drawn by Tisdale, and accepted by himself and

partner, in favor of the plaintiff; which is certainly valid. It is not unusual in mercantile transactions for partners to draw, payable to themselves, or their order; Douglas, 653: and for one or both to indorse to some third person; then, two may with equal propriety promise to pay to the order of one.

Reasons overruled.

HILLSBOROUGH DISTRICT, *October Term*, 1800.

JOHN LOUIS TAYLOR, Judge.

CLARA NEWTON v. ROBINSON.—Page 72.

If a *feme covert* sue in her own name for the amount due for her attendance as a witness during coverture, she shall recover, if her marriage be not pleaded in abatement; advantage of it cannot be taken on a motion for a nonsuit.

The plaintiff had been summoned a witness in a cause, wherein the defendant, being the party cast, became liable to pay the costs; in order to recover the amount of her ticket, she warranted him before a magistrate, from whose judgment an appeal was taken to the County Court, and the cause was thence brought in the same way to this court.—Pleas, general issue and set-off. It appeared in evidence that the plaintiff, as well at the time of being summoned, as of attending as a witness, was a feme covert, and that her husband was still alive; whereupon *Haywood* moved that she should be non suited, urging that any judgment rendered for her w uld be absolutely void. The motion was overruled by the court, and a verdict found for the plaintiff. Afterwards, in the same term, the question was renewed in the form of a motion to set aside the verdict.

Haywood, for the defendant. Upon examining the authorities relative to the question that was made on the trial of this cause, I am apprehensive that a mistake has been

committed in delivering the law. They will, as I conceive, shew that it was not necessary to plead the coverture in abatement, and that no judgment can regularly be given upon this verdict. It is a general rule that no plea in abatement is good, unless it give the plaintiff a better writ; and hence it follows that in those cases where the plaintiff cannot have a better writ, the defendant cannot plead in abatement. Here the money was due and payable to the husband alone; the plaintiff, if she survive, cannot recover it; consequently she cannot join with him in bringing the action. As therefore she can have no writ, either separately or joined with her husband, no plea in abatement would have availed the defendant. All the cases which will be relied upon, on the other side, to prove the contrary position, will be where the cause of action accrued before the coverture, and where, consequently, the husband and wife might join, because it would survive to the latter. Nor can any case be shewn where coverture is pleaded in abatement to an action brought by a feme covert, upon a cause of action arising during the coverture. So far has the principle been extended, that the earnings of a wife during coverture belong to the husband, that even what has been thus acquired by a wife *de facto*, has been held to belong to the second husband, he having no notice of the former marriage; 1 Strange, 80. It is no less clear that a judgment rendered in favor of a feme covert is absolutely void; 2 Wils., 3, and that the coverture may be given in evidence; 1 Strange, 79. Buller, 21, 113; 6 Term Rep., 265. He also cited 1 Wils., 224, in order to shew that wherever the cause of action will survive to the wife, they must join: whence he inferred that a joinder under any other circumstances would be improper, and furnish a good ground of demurrer to the declaration.

Norwood and *Cameron*, for the plaintiff. Coverture in the plaintiff can only be pleaded in abatement; to prove this we rely on Comyns, Dig., tit. Pleader, 2 *a* 1, and 3 Term Rep., 627. As the cause of action arose from the personal labor of the wife and was founded on the certificate of her attendance as a witness, she might have been

joined with the husband; 2 Bl. Rep., 1239. Cro. Eliz., 61. Cro. Jac., 205. 2 Wils., 424. Hence as the plaintiff, by joining with her husband, might have had a better writ, the arguments drawn from the contrary supposition, to prove the impossibility of pleading in abatement, lose all their force. Here the defendant, by having pleaded in bar, has admitted the plaintiff able to recover judgment, and therefore she cannot be disabled from having execution, by anything which has happened precedent to the judgment; 2 Ld. Ray, 853. In the case cited from 2 Wils., 3, the judgment was entered up by confession, upon a warrant of attorney, in which case the defendant had no day in court to plead the coverture, and there was no other way to examine the matter but by motion.

By the Court. It is laid down in the books as a general rule, that coverture, either before the writ sued out, or pending the writ, is a good plea in abatement. If those cases where a feme covert sues upon a cause of action arising during the coverture, really formed an exception to the rule, it certainly was of too much importance to have been overlooked by writers upon this subject: yet no trace of a distinction arising from this source is anywhere to be discovered. It is indeed said in 1 Bac., 16, that by coverture before the writ, it is abated *de facto*, whereas coverture after the writ only proves it to be abatable; but the same writer proceeds by adding that both are to be pleaded; and this is also established by the case cited from 3 Term Rep. If that be correct, the present case is not affected by the distinction. The meaning of it, however, I take to be this, that where it appears upon the face of the writ itself to be false, or that any judgment rendered upon it would be erroneous, the court may interpose *ex officio*, and abate it without plea; but that whenever the circumstance, tending to shew the defect, is extrinsic, it ought to be pleaded. To apply this criterion to the present case, let it be enquired whether this judgment be erroneous? I think both authority and reason decide that it is not. It is said in Carthew, 124, that a judgment rendered in favor of a feme covert who sues by attorney,

cannot be reversed for error, if the defendant pleads in bar. The very same point is adjudged in 10 Mod., 166, and it is precisely the case under consideration. The reason upon which these decisions are founded is, that the coverture might have been pleaded in abatement, and that what may be so pleaded cannot be taken advantage of in error. In the view of justice and propriety also, it is right, that if a defendant pleads to issue, (thereby treating a feme covert as if she were sole, and compelling her to summon witnesses, and prepare for a trial on the merits, when he might have abated her writ at the outset,) he should be bound by the judgment. I incline to think that the cases cited on behalf of the plaintiff shew that she might have joined her husband in this action, for the reasons that might have been given, though I do not give any positive opinion on this point, as I conceive it unnecessary in the decision of this cause. For though the rule mentioned, that a defendant pleading in abatement must furnish the plaintiff with a better writ, be general, it is far from universal; and it cannot consistently with reason apply to this case. This is a plea to the disability of the person of the plaintiff, founded on her legal incapacity to bring a suit; this alone is stated in the forms of such pleas, which do not prescribe any method in which she may bring another writ. It resembles the pleas of alienage, and those of outlawry, which presuppose that the plaintiff can bring no suit at all, while the disability lasts. In strict language, these are not actually, but only in the nature of, pleas in abatement. Wherever the exception points to the writ or declaration, the defendant must furnish the plaintiff with a better; but where it questions the very power and capacity of the plaintiff to sue, it cannot be thought necessary for the defendant to do a thing upon the absolute rejection and denial of which his defense is built. Upon the whole I think the motion must be

Overruled.

BRYAN v. BRADLEY, et al., bail of Donaldson.—Page 77.

If the writ be altered from debt to case, the bail are no longer bound.

Scire facias on a bail-bond. Plea, *nul tiel record*. The writ had been originally issued in debt, and, in conformity therewith, the sheriff had taken the bail-bond. In the County Court, the writ had been altered from debt to case, to which latter action the subsequent proceedings corresponded. For the defendant it was argued that these variances were fatal; and,

By the Court. The bail can be made liable in no other manner than as they have stipulated by their bond. In this case it is conditioned to be void, if the principal appears to answer to an action of debt, which the plaintiff hath instituted against him; but a different action from this is afterwards prosecuted; consequently, the condition of the bond is not broken. The bail can say with truth, *non hæc in fœdera venimus*—Whereupon the plaintiff's motion for the *scire facias* was

Quashed.

CAMPBELL & CO. v. HESTER'S EX'R.—Page 78.

A plea of the statute of limitations, not being a plea to the merits, shall not be added after the pleadings are once made up: therefore an executor shall not be allowed to add the plea of the act of 1715, (see 1 Rev. Stat., ch. 65, sec. 11,) if he neglect to plead it at first.

Appeal from the County Court of Granville upon the question, whether the defendant, under the circumstances of the case, should be permitted to add the plea of the act of 1715, concerning proving wills, &c., section 9th. The

tion was founded on an affidavit filed at the May Term, 1800, of the County Court, stating in substance, that the defendant at the return term, about fifteen months before, had employed an attorney, who, he expected, would avail himself of any legal defense there might be to the action: that the pleas had been entered, without the intention of waiving the benefit of any act of limitation that might apply to the case; but that the plea of the act referred to, had been omitted, by reason of a belief prevailing in the profession that it was not in force. Upon this affidavit, the County Court made an order that the plea should be added; from which the plaintiff appealed.

Haywood, for the defendant, argued that the defendant, being an executor, defending the estate from an old demand, was entitled to any indulgence the law could shew; especially as the time limited for the distribution of the estate had expired before the present suit was brought. That courts had frequently permitted the addition of a plea, where it furnished a substantial defense, and had no tendency to delay the plaintiff. That the act of limitation, having for its object the quiet of men's estates, and the prevention of litigation, was a wise and politic law, and notwithstanding the prejudice sometimes entertained against it, had been denominated by able Judges, a just and beneficial statute. That in 1 Wils., 177 the defendant was allowed to add the plea of the statute of gaming: the object of which was to avoid the payment of a debt, to which he was bound by the ties of honor and conscience, though forbidden by a municipal regulation, on the ground of public policy. That the plea now offered would do justice in the case, and had been omitted only under the influence of a prevailing error.

Norwood, for the plaintiff, admitted, that in some cases the courts had permitted a plea to be added, which amounted to a fair and honest defense, and which had been omitted, through surprise or inadvertence at taking the rules; but that such a plea as was now offered, had been uniformly rejected, because its object, instead of a trial on the merits,

was to bar the plaintiff, though his claim should be perfectly just. He cited Barnes, 352, 332. 2 Wils., 253.

By the Court. It would be establishing a very bad precedent to suffer this plea to be added, after so long a delay has taken place in this cause. But whatever inclination I might have to permit the addition on the grounds that have been stated, the case cited from 2 Wils. is too strong to be resisted; there the addition of the statute of limitations was denied, because it was not a plea to the merits. The plea now offered is exposed to that as well as to this further objection, that the act of 1715 contains no exceptions as to infants, feme coverts, &c., differing in this respect from all other acts of limitations. As this act therefore would bar all persons upon whose demands the time had run, whatever disabilities they might be under, arguments against the plea of the statute apply *a fortiori* to this case.

Motion denied.*

*Vide Bos. and Puller's Rep.

NOTE.—The plea of the statute of limitations may be pleaded after issue joined, upon payment of full costs under peculiar circumstances. *Reid* v. *Hester*, Conf. Rep., 488. *Johnston* v. *Williams*, Ibid., 518. *Hamilton* v. *Shepard*, 2 Car. Law Repos., 471.

YEARGAIN v. JOHNSTON and HOPKINS.—Page 80.

In an action for overflowing the plaintiff's land, he need not prove his title, though it be set forth in the declaration, for possession alone is sufficient to support this action against a wrong doer.

This was an action on the case for overflowing the plaintiff's land, by means of a mill-dam erected by the defendant. The declaration stated that the plaintiff was seized in his demesne as of fee, and possessed of the lands in question.

Duffy, for the defendant, contended, that although the plaintiff was not bound to state his title in the declaration,

yet, having thought fit to do so, he was compellable to prove it; for which he cited and relied upon the case of *Bristow* v. *Wight and Pugh*, Douglas, 640, but,

By the Court. Possession alone is sufficient to maintain this action against a wrong-doer, and as such the defendants are charged. The gist of the action is a nuisance committed by them upon land in the plaintiff's possession; and as all averments beyond this are immaterial and not put in issue in this action, they need not be proved. The case cited is of a variance in the description of a contract; and the cases therein referred to as warranting the decision of the court, cannot fairly be extended beyond those cases where records, or written contracts, are set forth in the declaration: these, if stated at all, ought to be stated truly. The possession here is the ground of the action, and had that been described in any particular way, as derived under lease for years or otherwise, the proof ought to have corresponded with the allegation, but as the *seizin* of the plaintiff is altogether impertinent, it need not be proved. The plaintiff had a verdict.

NOTE.—The acts of 1809 and 1813 (see 1 Rev. Stat. ch. 74, sec. 9, 10, 11, 12, 13, 14, 15 16 and 17) prescribe a peculiar remedy by petition for persons injured by the erection of mills.

SALISBURY DISTRICT, *September Term*, 1800.

JOHN LOUIS TAYLOR, Judge.

JOHN NESBIT v. MONTGOMERY'S EX'S.—Page 82.

NOTE.—See S. C., reported in Conf. Rep., 318.

NEWBERN DISTRICT, *March Term*, 1799.

JOHN HAYWOOD & ALFRED MOORE, Judges.

STANLY & WIFE v. KEAN.—Page 93.

A will which has been admitted to probate improperly in the County Court, cannot be attacked on that ground incidentally: therefore, in an ejectment, a copy of a will may be read as evidence, though one of the witnesses, who proved the will, was a legatee.

This was an ejectment, brought to recover a lot which Mrs. Stanly claimed as heiress to Fonville. The defendant set up a title under the will of Fonville, a copy of which he offered in evidence, the original having been proved in the County Court, by two subscribing witnesses, and thereupon admitted to registration.

The evidence was objected to, on the ground that one of the witnesses was a legatee under the will, which therefore was irregularly proved; and that it was only in those cases, where the probate was regular, that a copy could be admissible under the act of 1784, cap. 10, sec. 6, which enacts that "all probates of wills in the county courts, shall be sufficient testimony for the devise of real estates; and the attested copies of such wills, or the records thereof by the proper officer, shall and may be given in evidence in the same manner as originals.

By the Court. The copy is proper evidence unless there be a suggestion of fraud or irregularity, in the attestation or execution. It has been decided that a probate does not absolutely bind one who is not party to it; but that he may cause the will to be proved again by calling all parties interested before the court which took the first probate, and re-examining the evidence concerning it.

By such a mode of proceeding, there is no danger of surprise to the parties, who are informed of the grounds upon which the will is to be contested, and may prepare them-

selves for the emergency. So, if a foundation is laid for presuming such a fraud as would invalidate the will, the party claiming under it, in the trial of ejectment, may be called upon to produce the original; but then, he ought to have notice of the objection to be made, so that he might prepare to resist it. As this will has been admitted to probate and registration, by a court possessing competent authority, all circumstances necessary to its validity must be presumed to have been duly established before them.

Nonsuit.

Badger, for the plaintiff.
Graham, for the defendant.

TAGERT v. HILL.—Page 95.

NOTE.—See S. C. reported in 2 Hay. Rep., 81, and upon a motion for a new trial in Conf. Rep., 164.

BRYAN v. CARLETON and ALLEN.—Page 103.

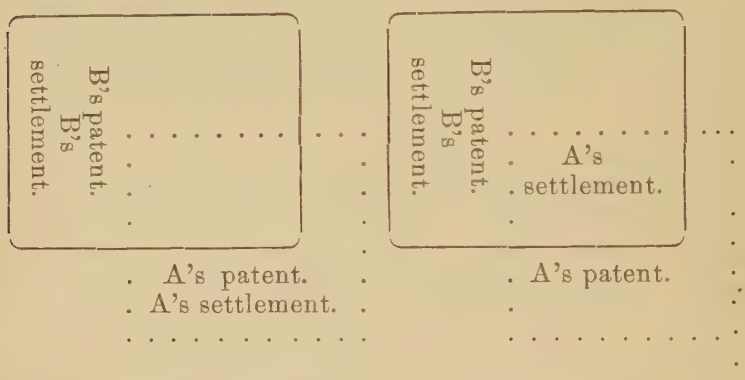
When a tract of land is, as to part, included in A's deed or patent, and the same part is also included in B's deed or patent, and each grantee is settled upon that part of the tract, comprised in his deed, which is not included in both deeds, the possession of the part included in both deeds is in him, whose deed or patent is the oldest; but if one of them is actually settled upon such part included in both deeds for seven years together, the possession is his, and the other will be barred thereby.

A question arising in this case, relative to the legal effect of a concurrent possession, where both parties claim under title; the following opinion was delivered:

By the Court. Where a tract of land is as to part, included in A's deed or patent; and the same part is also included in B's deed or patent, and each grantee is settled upon that

part of the land comprised in his deed, although not included in both deeds; the possession of the part included in both deeds, is in him whose deed or patent is the eldest.

But, if one of them is actually settled for seven years together, upon the part comprehended in both deeds, the posession is his, and the other will be barred thereby.



NOTE.—See acc. *Borretts* v. *Turner*, 2 Hay. Rep., 113, and the cases referred to in the note thereto.

HANCOCK, BY GUARDIAN v. HOVEY.—Page 104.

The act of 1784 (1 Rev. Stat., ch. 37, sec. 19) requiring that deeds of gift shall be recorded, applies only where creditors and purchasers are interested.

Detinue for a negro slave. Upon *non detinet* being pleaded, the case was, that the negro sued for had been given and delivered to the plaintiff in presence of witnesses, and had remained in possession of his guardian for several years.

Harris, for the defendant, objected that a deed of gift duly recorded, was necessary to complete the plaintiff's title, under the 7th section of the act of 1784, cap. 10, the words of which are: "And whereas many persons have been injured by secret deeds of gift to children and others, and for want of formal bills of sale for slaves, and a law for petuating such gifts and sales for remedy whereof be it enacted, that all sales of slaves shall be in writing, attested by at least one

credible witness; or otherwise shall not be deemed to be valid: and all bills of sale of negroes and deeds of gift, of whatever nature, shall, within nine months after the making thereof, be proved in due form and recorded: and all bills of sale and deeds of gift not authenticated and perpetuated in manner by this act directed, shall be void and of no force whatever."

Moore, J. The act of Assembly referred to does not reach this case. It does not require a deed of gift as essential to constitute a title, but merely provides that where a deed of gift is made, it shall be recorded.

Haywood, J. I am of opinion that no deed of gift is necessary, under the circumstances of this case. The evil the Legislature intended to remedy, was the want of a law for perpetuating gifts and sales, which, before the passing of the act of 1784, were made secretly; and the remedy designed, was for the benefit of creditors and purchasers, since none others could be injured by the want of a perpetuation. In this case the mischief does not exist, for there are no creditors or purchasers; nor was the transaction secret, for a delivery is made, and possession openly and publicly kept afterwards. This is very different from the sort of transaction the act aims at.

Had the transaction been secret, or were the rights of creditors or purchasers liable to be affected, I should have thought a deed of gift necessary; otherwise the act would produce the effect of making the generality of such transactions more secret than they would have been without it; for, in those cases where the gift is intended to be kept secret, no deed of gift will ever be made, if, when made, it must be recorded, and thus made public; but if not made, the gift will be good without. Such a construction is surely at variance with the spirit of the act.

Verdict for the plaintiff.

Note.—See note to *Ferrell* v. *Perry*. 1 Hay. Rep., 2.

GARDNER v. ELLIS'S HEIRS.—Page 106.

A *sci. fa.* against an infant heir to charge lands may be served on a guardian appointed by the Court *pro hac vice*, but there should regularly be a guardian appointed by the proper Court before the *sci. fa.* issues.

This was a *scire facias* against an infant who had no guardian, and was issued in order to subject the lands to a debt of the ancester.

MOORE, J. The practice of appointing a guardian upon the return of a *sci. fa.* after service upon the infant, is liable to objection: for as such guardian gives no security, the infant may lose a remedy against him, if he mismanages the defense. We will, however, appoint a guardian for this defense; but it is proper to take notice, that hereafter applications should be made to the proper court, for the appointment of guardians, before the *sci. fa.* issues.

HARGETT v. BLACKSHEAR.—Page 107.

Whether one who claims title under an execution is bound to produce the judgment as well as execution. Qu?

The question of law arising in this case was, whether the plaintiff who claimed title under an execution, and sale thereupon by the sheriff, was bound to produce the judgment?

MOORE, J. The judgment ought to be produced, otherwise the defendant's property may have been taken and sold by an execution issued without authority. The judgment is the warrant for the execution, and without it no execution can legally issue.

HAYWOOD, J. When an execution issues to a sheriff, he is

bound to proceed by a seizure and sale, without enquiring whether a judgment exists or not, or if it exists, whether it be legal; and if he is bound to sell, it is contradictory to say that none shall purchase. This is the case of a vendee, which distinguishes it from those where it is held necessary to produce the judgment. If there be no judgment, or a void one, or one liable to be vacated for irregularity, or reversed for error, and a plaintiff will take out execution thereon, he is liable for the consequences; and therefore, when sued, must produce the judgment as well as the execution, in order that the court may see that it is a good judgment. So if the sheriff seize the goods in the possession of a third person, (who claims them by a conveyance from the defendant) as still belonging to the defendant, alleging the conveyance to be fraudulent, he must produce the judgment, in order to shew that the creditor is a *bona fide* and a judgment creditor, and one against whom a conveyance, without a fair and valuable consideration, is fraudulent within the act. The books say, strangers to the judgment and execution must produce the judgment, but the meaning evidently is as before stated: for if a third person, a stranger, against whom no imputation of fraud is made, sues the sheriff for a seizure of his goods by execution, neither the judgment nor execution will avail the sheriff, since the execution gave him no authority to seize the plaintiff's goods; and why should the judgment be produced, when it will not avail him who produces it? The vendee is altogether a stranger to the judgment, no way accountable for its irregularity, and need not produce it. If the judgment be reversed after the sale, still he shall retain the property; if so, why require him to produce the judgment, which, although it be reversed, and produced with the *vacatur*, leaves his title unimpeached? The production of the judgment can answer no other purpose, but to shew that there was a judgment of some sort, good or bad, when the execution issued. But if his title remains, though the judgment be void, is it not equally unaffected, though there be no judgment? That it is so in the first case, arises from his having purchased from a pub-

lic officer, selling under a lawful authority, viz., the execution which issued from a proper court, and is duly attested: his claim of title in the other case, rests on a foundation equally solid.

Were the law otherwise, and vendees liable to lose the property, whenever a judgment should be declared illegal, irregular or void, but few would purchase at execution sales. Few indeed are qualified to form an opinion on that head, could they even inspect the record, which in many instances it would be difficult to do. Thus where an execution issues from Currituck to the sheriff of Buncombe, must the intended vendee go all the way to the former for a copy of the record, to lay before counsel before he dare purchase? There is no necessity for all this, because in all cases of irregular and void judgments, the plaintiff, and not the vendee, is answerable to the person injured; and it is perfectly right that he who is in fault should be exclusively liable, and not the vendee who is innocent; for if there be no judgment (a circumstance that will seldom occur) the matter can be easily set right by a *supersedeas*, and other remedies.

Is it then advisable to render execution sales, which are the life of the law, subjects of doubt, controversy and suspicion, for the sake of avoiding an evil, barely possible; (and which may easily be rectified if it does occur, though at all times it is little to be apprehended) thereby rendering it dangerous for all men to purchase at these sales, unless they were convinced of the legality of the judgment; a degree of satisfaction which, in most cases, it would be impossible to attain with certainty?

NOTE.—It is now clearly settled that a person claiming title under an execution sale must produce the judgment as well as the execution: and if the execution be not warranted by the judgment, the sale will not avail to pass the title, though the officer will be protected. *Bryan* v. *Brown*, 2 Murph. Rep., 343 *Whitehurst* v. *Banks*, Ibid., 346. *Dobson* v. *Murphey*, 1 Dev. & Bat. Rep., 586.

BLOUNT, Ex'r of Ogden v. STARKEY'S ADM'RS.—Page 110.

An order to pay money is, in the hands of the drawee, evidence of payment; otherwise of an order to deliver goods.

In this case it was held by the court, that an order drawn by the defendant upon the plaintiff for the payment of money, and by him retained, is evidence that the money was advanced, agreeably to the directions of the order; but that an order under the same circumstances, for the delivery of goods, is not of itself evidence of the delivery; to prove that fact, additional evidence is necessary.

Harris, for the plaintiff.

Slade, for the defendant.

WITHERSPOON and WIFE v. BLANKS.—Page 110.

If a natural boundary be called for in a grant, a line is to be extended to it, disregarding distance.

The principal question of law arising in this case was, whether a line shall be extended, so as to reach a natural boundary called for.

By the Court. The line in controversy, when run to the end of the distance called for, will not reach Cypress Creek; where, by the patent it is said to terminate; but to reach that place, it must run three times the distance called for. In all such cases, the invariable rule is to disregard the distance; and to proceed with the line in the direction

called for until it shall intersect the creek, or other natural boundary.

Verdict for the plaintiff.

Badger, for the plaintiff.
Graham, for the defendant.

NOTE.—See the cases referred to in the note to *Bradford* v. *Hill*, 1 Hay. Rep., 22, and the note to *Person* v. *Roundtree*, 1 Martin's Rep., 18.

SLADE v. GREEN.—Page 111.

If one entitled to two-thirds of three lots, sells two lots, the sale is evidence of a partition.

Ejectment. The devisor gave three lots to his wife and two children, equally to be divided: one of the children died after the death of the devisor, whereby his third descended to the surviving child, who sold two of the lots. —The third was left unsold for a considerable time.

By the Court. This is evidence of a partition, and that the third lot was assigned to the widow.

Verdict accordingly.

Slade, for the plaintiff.
Woods, for the defendant.

EDENTON DISTRICT, *April Term*, 1799.

BORRETTS v. TURNER.—Page 112.

NOTE.—See S. C. reported in 2 Hay. Rep., 113.

ANONYMOUS.—Page 113.

NOTE.—See S. C. reported in 2 Hay. Rep., 99.

TRUSTEES OF THE UNIVERSITY v. SAWYER.—Page 114.

Grants of escheated or confiscated lands, by officers appointed to issue grants for vacant lands, are void, and must be so declared on the trial of an ejectment.

Ejectment. The land was originally granted to a person who left the State before the year 1771, since which time he has never been heard of. In the year 1780, part of the same tract was granted to a person, whose title hath devolved to the defendant, and in the year 1788, another part of the same tract was granted to another person, whose title had likewise come to the defendant.

It was argued by the defendant, that the State, at the time of these respective grants, was entitled to the land, either by escheat or confiscation; and having granted them to persons under whom the defendant claims, could not afterwards make a valid grant of the same lands to the University.

But secondly, supposing the grants under which the defendant claims to be voidable, as having issued by a mistake occasioned by the misrepresentation of the grantees; nevertheless they cannot be avoided on a trial in ejectment. But,

By the Court. The officers authorized by the government to sell and convey vacant lands which had never been appropriated by any grant, have sold and conveyed lands which have been thus appropriated: to this their power did not extend, and consequently all such sales and grants are void. The court will not, on the trial of an ejectment,

declare that grants thus circumstanced, shall be recalled and cancelled; but they are bound by the positive terms of the act of 1777, cap. 1, sec. 3 and 9, to declare that they transfer no title.

Verdict for the plaintiffs.

HALIFAX DISTRICT, *April Term*, 1799.

BUSTIN v. CHRISTIE.—Page 116.

If upon the face of a deed it be uncertain whether the boundary line be at one place or another, parol evidence may be received to shew the true place: thus the line called for was "North to Bryant's;" north would not lead to Bryant's corner, though it would strike his line, and there was an old marked line to the corner permitted to be proved by parol.

Ejectment. The question in this case was, whether the land in question, which was a triangular piece, was included within the bounds of Jefferie's patent, under which the plaintiff claimed.

This patent began on Fishing Creek, then East 320 poles, along Pollock's line to Pollock's corner, thence North to Bryant's; then along Bryant's line 320 poles to the creek. A north course from Pollock's corner intersects Bryant's line, at the distance only of 130 instead of 320 poles from the creek, and at a point 190 poles from Bryant's corner.

The plaintiff's counsel contended, that from Pollock's corner to Bryant's described a line from one corner to the other.

The defendant's counsel on the other hand insisted, that the line described on the patent, being from Pollock's corner north, ought not to be departed from; that the words of the patent were as well satisfied, should the line from Pollock's corner terminate at Bryant's line, as if it terminated at Bryant's corner. He relied upon the case of *Bustin* v.

Hill, relative to the same case, where Judge WILLIAMS had so determined. Haywood's Rep.

MOORE, J. Parol evidence has been adduced in this case, tending to prove that there was an old marked line from Pollock's to Bryant's corner; and that some ancient deeds are bounded by it. The first settlers of this country came here at the risk of their lives; induced by the prospect of becoming proprietors of land, and thereby improving their circumstances, they settled in a wilderness then inhabited by savages. They were invited to do so by the Lords Proprietors, who remained at home in security, received the purchase money, and derived a revenue from the lands, even after they were sold. They appointed and continued in office the persons who received entries, made the surveys and issued the grants; and therefore ought, in justice, to be responsible for their mistakes. The settlers had no share in the appointment, nor were they at all instrumental in the mistakes that occurred. If these officers injured the Lords Proprietors, they appointed them and must bear the consequences; if a purchaser is likely to be injured by their mistakes, these ought to be rectified, and the mischief prevented.

The case cited adverts to several others, where this has been done by juries upon trials in ejectment, upon proper evidence of the mistake; and if these cases were law when decided, they continue to be so at this day. If, therefore, the jury are satisfied that the line really intended was from one corner to the other, I am of opinion they ought to find for the plaintiff, notwithstanding it is described in the patent, as a line running north from Pollock's corner.

Verdict for the plaintiff.

NOTE.—See *Bradford* v. *Hill*, 1 Hay. Rep., 22, and the note thereto, and also *Person* v. *Roundtree*, 1 Martin's Rep., 18, and the note thereto.

ANONYMOUS.—Page 118.

Damages cannot be claimed under the act of 1796, (see 1 Rev. Stat., ch. 13, sec. 8,) on a bill which has not the words "for value received."

This was an action upon a bill of exchange drawn in this State upon a person resident in Philadelphia, and protested for non-payment: it had not the words "for value received," and

By the Court. The plaintiff is not entitled to the ten per cent. damages under the act of 1796, cap. 22, by reason of the omission of these words.

YOUNG v. DREW, and SAME v. HARRIS.—Page 119.

The plaintiff cannot declare in ejectment for a whole tract of land, and give evidence of title to, and recover, an undivided moiety.

In these ejectments, the plaintiffs declared for the whole tract of land, and gave evidence of a title to an undivided moiety.

White, for the plaintiff, argued that he was not bound to declare for the exact quantity he had a right to recover; but that it was sufficient if he proved a title for the same or any less quantity than that stated in the declaration. He cited and relied upon the case of *Gaskin* v. *Gaskin*, Cowper, 657, as an instance of the recovery of two-thirds of the premises comprised in the declaration.

Moore, J. The plaintiff ought, in this case, to have declared for an undivided moiety of the whole tract; otherwise the action of ejectment will have the effect of a writ of partition: the sheriff cannot put the plaintiff in possession of the half he claims, not being stated to be an undivided half, unless he previously makes a division, and ascertains

the moiety the plaintiff is to have. The case cited from Cowper does not resemble the present. That is where one tenant in common recovered against another.

Nonsuit.

NOTE.—These cases have been overruled. See *Squires* v. *Riggs*, 2 Hay. Rep., 150, and the case referred to in the note.

KNIGHT v. KNIGHT.—Page 120.

A married woman may file a bill for separate maintenance against her husband in her own name without a *prochein ami*.

Bill by a feme covert for a separate maintenance, *propter sœitiam;* to which there was a demurrer, for that it was not brought by her *prochein ami*.

Plummer, for the complainant, said it had been the practice in this court to institute such suits, without a *prochein ami;* that in England, the only purpose of requiring a *prochein ami* was, that there might be some person to answer for the costs; yet even there, the books furnished instances of the wife suing alone. 1 Eq. C., *a.*, 67. 1 Ch. Cas., 4, 64. But since the act of Assembly in this State, requiring all persons who sue, to give security for costs before the process issues, the reason of the practice in England, even if it were uniform, does not exist here. He added that such security had been actually given.

By the Court. Let the demurrer be overruled, and the defendant answer.

NOTE.—But see *Ward* v. *Ward*, 2 Dev. Eq. Rep., 553, where it was held that in suits by married women, a *prochein ami* is necessary, not only to secure the costs, but, when her husband is a defendant, to interpose a suitable adviser; and this rule is not dispensed with, even where the wife sues *in forma pauperis*.

BARRY v. INGLIS, and others.—Page 121.

In an action for an assault, any immediate provocation may be given in evidence to mitigate damages, but not any remote provocation.

Trespass, assault and battery, in which evidence was offered of a provocation given by the plaintiff some time before the assault.

Moore, J. Held that any immediate provocation given to the defendant by the plaintiff, may be shown in evidence to mitigate the damages; but that a remote provocation ought not, for then it would be necessaty to go into quarrels and disputes, which prevailed between the parties, perhaps years before the combat. Such things ought not to be considered as alleviating the offence of falling upon the plaintiff, at a subsequent late period, after there was time for the passions to cool, and the defendant's conduct to be guided by reflection.

Evidence refused.

Note.—See *Sledge* v. *Pope*, 2 Hay. Rep., 402. *Causee* v. *Anders*, 4 Dev. & Bat. Rep., 246.

FELTS and WIFE v. MARY FOSTER and THOMAS WILLIAMS.—Page 121.

Cohabitation as man and wife and having children is evidence of a marriage.

The plaintiffs were entitled by the will of Foster, deceased, to a considerable part of his property, in the event of his widow, Mary Foster, the now defendant, marrying again. The bill charged that she was married to the other defendant, which they severally denied by their answers.

MOORE, J. The answers of the defendants ought to be read to the jury, and by them considered. There is in this case no positive proof of a marriage, but there are circumstances advancing to create a belief that a marriage has taken place: they have lived together a long time, as man and wife, have had several children, and the witnesses say that she was a woman of irreproachable character, before these things happened. If so, a presumption arises that she would not thus have cohabited with the defendant, unless a marriage had been previously solemnized. Upon such evidence, I think the jury may find a marriage.

Verdict accordingly.

NOTE.—See *Whitehead* v. *Clinch*, 2 Hay. Rep., 3, and the note thereto.

GREER v. BLACKLEDGE.—Page 122.

The assignor of a bond is not released by the obligor being discharged on a *ca. sa.* under the insolvent debtor's law.

The defendant had assigned a negotiable bond to the plaintiff, who instituted a suit against the obligors, and having recovered a judgment, took them in execution upon a *ca. sa.;* from this, they were duly discharged under the act for the relief of insolvent debtors.

MOORE, J. The discharge of the obligors is no satisfaction of the debt. The plaintiff is entitled to recover from the defendant, notwithstanding this discharge.

Verdict for the plaintiff.

NOTE.—See *Greenlee* v. *Young*, 1 Hay. Rep., 3.

WILMINGTON DISTRICT, *May Term*, 1799.

COBHAM v. ASHE.—Page 123.

Possession without colour of title will not avail anything under the statute of limitations.

A right of entry cannot be transferred while another person is in the adverse possession of the land.

In this ejectment, it was proved that Walker had sold the land in question to the plaintiff's father, and had given him a bond, conditioned to execute a title at a future day; at the same time, the father declared by deed, that the land was purchased for the plaintiff, his son. During the late war the commissioners of confiscated property seized the land as the property of the father, and sold it to the defendant, who took possession in 1786, and remained in possession unto the present time. In 1798, and a short time before the present suit was instituted, Walker executed a deed to the plaintiff.

HAYWOOD, J. The defendant's possession, though continued for seven years, yet being unaccompanied with any colour of title, during a great part of that time, will avail him nothing. But the title of the plaintiff is itself defective, because the conveyance from Walker was at a time when the defendant was in possession under an adverse claim: even Walker, who had the legal title before this time, could only have acquired the possession, by a suit in ejectment; but this right of entry he ought to have enforced himself, and could not legally transfer it to the plaintiff.

Verdict for the defendant.

NOTE.—Upon the first point, see the note to *Strudwick* v. *Shaw*, 1 Martin's Rep., 34; S. C., 1 Hay. Rep., 5.

On the second point, see *Slade* v. *Smith*, 1 Hay. Rep., 248, and the cases referred to in the note.

BURGWIN v. HOSTLER'S ADM'R.—Page 124.

The representative of a deceased partner cannot be sued while there is a surviving partner.

One of several partners drew a bill of exchange in the name of the company; the bill came by indorsement to the plaintiff, who brought this suit against the administrator of a deceased partner; there being another partner still alive. Upon the general issue being pleaded, this objection was taken by the defendant's counsel; to which the plaintiff replied, that it ought to have been taken advantage of by a plea in abatement, in proof of which was cited the case of *Rice* v. *Shute*, 5 Burr., 2611.

By the Court. It is true that where one of two partners is sued by a joint transaction, he might, before the act of 1789, cap. 57, have pleaded this circumstance in abatement; because the plaintiff had made a contract, not singly with him, but with him and another, who was equally bound to contribute to the performance of it. Still, however, the defendant might have severed the contract, and rendered himself alone liable, which he effectually did, if he omitted to plead in abatement; for at no subsequent stage of the proceedings could he avail himself of the objection. But where one partner dies, the whole debt survives against the other, and the executors of the deceased partner, not being originally liable, cannot be made so, by suing them. Hence, as the fact has appeared in evidence, that there is a surviving partner, the legal consequence must be applied to it, which is, that he alone is liable.

Nonsuit.

NOTE.—See the act of 1789 (1 Rev. Stat., ch. 31, sec. 90) which, it is believed, extends to partners as well as other joint obligors.

R. SCHAW'S ADM'R v. R. SCHAW'S HEIRS.—Page 125.

An administrator is not entitled to claim anything for loss of time and personal services, though he will be allowed his necessary expenditures.

In a collateral issue made up under the direction of the court, between the heir and the administrator, the latter in his account against the estate had raised a charge, for his trouble and services, in performing the duties of an administrator. Upon the question whether such a charge was proper,

HAYWOOD, J. By the act of 1789, cap. 23, sec. 2. The administrator shall retain in his hands no more of the intestate's estate, than amounts to his necessary charges and disbursements, and such debts as he may legally pay within two years after the administration granted. For actual expenditures, therefore, he is entitled to an allowance, but not for loss of time and personal services.*

NOTE.—See *Clark* v. *Cotton*, 2 Dev. Eq. Rep., 51.

*Vide act of 1799, cap. 22. 3 P. Wil., 249.

STATE v. HALL.—Page 126.

Larceny may be committed of a slave: therefore in an indictment under the act of 1799 (1 Rev. Stat., ch. 34, sec. 10) for stealing a slave, it is not necessary to add "with the intention to sell or dispose of to another, or to appropriate to his own use," as that is implied in the charge of stealing.

The prisoner was indicted upon the act of 1779, cap. 11, for stealing a male slave, the property of the prosecutor, and was thereof found guilty by the verdict of a jury. The words

act are "that any person or persons who shall hereafter steal, or shall by violence, seduction, or any other means, take or convey away any slave or slaves, the property of another, with an intention to sell or dispose of to another, or appropriate to their own use such slave or slaves, and being thereof legally convicted, or shall, upon his arraignment, peremptorily challenge more that thirty-five jurors, or shall stand mute, shall be adjudged guilty of felony, and shall suffer death without the benefit of clergy." Upon a motion to arrest the judgment,

Badger and *Jocelyn* argued for the prisoner, that the offence of stealing a slave was unknown to the common law, since it did not recognize the condition of slavery, and also because larceny could only be committed of inanimate or irrational subjects; whereas a slave possesses the faculty of reasoning, and the power of violation like other men: hence, if carried away by his own consent, it is seduction, if without his own consent, he can declare his owner and be restored to him. A slave cannot, like the other subjects of larceny, be concealed forever from the inquiries of his owner. Neither by the Roman law, nor by that of any other country where slavery has prevailed, could theft be committed of a slave; and this principle is expressly recognized by the common law, with regard to villeins.

If, therefore, this offence never hath been felony before the passing of the act of Assembly upon which the prisoner is indicted, it follows, that it is not felony, unless done under all the circumstances specified in the act, and annexed to it, as forming a part of the crime: one of these is omitted in the indictment. The Judges of a free country are emphatically bound to decide upon penal laws, especially those of the capital kind, according to the letter. They may perhaps regulate the construction by the spirit, where the letter comprehends a case manifestly not within the meaning of the Legislature; but they will never extend the act by construction, to make a case punishable under it, which the letter does not reach. Upon the strict adherence to this rule, every citizen must depend

for his safety; and for the protection of his life against any attempt to deprive him of it, founded on the pretense that he has offended against the meaning of a penal law. If, in cases of this kind, constructions are to be allowed, the consequences to the community will be of the most dangerous kind. The caution which hath been heretofore observed on such occasions, is evidenced by various authorities. Thus where the statute of 3 H. 7, c. 2, enacted, "That if any person take for lucre any woman, &c., and afterwards she be married to such misdoer, &c., he shall be capitally punished:" Here, although the taking for lucre does not seem to be such a circumstance as would enhance the offence, yet it must be stated in the indictment; because such are the words of the statute; 4 Bl. Com., 208. So if a statute enact that those who are convicted of stealing horses shall be capitally punished, yet he shall not be thus punished, who is guilty of stealing but one horse; 1 Bl. Com., 88. The same principle has been applied to the Stat. of 14 Geo. 2, cap. 6, by which stealing sheep or other cattle was made felony without benefit of clergy.—The words "other cattle," were considered too loose to create a capital offence; 1 Bl. Com., 88.

Then to apply this reasoning to the act of Assembly: the word "steal" must be connected with and govern the words "slave or slaves, the property of another," as much so, as the words take or convey away: otherwise the fact of stealing no matter what will be a capital felony. Then, as the words "with an intention to sell or dispose of to another," &c., immediately follow in continuation of the same sentence, before any new subject is taken up, and without any disjunctive particle, they are, by the rules of syntax, concomitant to them; equally, where governed by the verb "steal" as where governed by the verbs "take and convey away." Thus *reddendo singula singulis*, the act stands thus: "that any person or persons who shall hereafter steal any slave or slaves, the property of another, with intention to sell or dispose of to another, or appropriate to their own use such slave or slaves; and that any person or persons who shall by violence, &c." Hence, the crime defined and

created by the act is stealing a slave with the intention to sell or dispose of to another, or to appropriate to his own use. These words, marking the intention, being omitted in the indictment, the prisoner is found guilty of an offence altogether different from that which the act of Assembly seeks to repress by such severe sanctions: wherefore they concluded the judgment ought to be arrested.

Moore, J. There is no rule of the common law, which expressly decides that the stealing of a slave is larceny; but there is a rule which declares that the stealing of the personal chattels of another, with a felonious intent, is larceny; and a slave is the personal chattel of his owner. This *rule* consequently extends its protection to every species of personal property, though not admitted and known as a subject of property, when the law was formed.

With respect to the act of Assembly, it was passed in turbulent times, when a practice prevailed of carrying slaves away, under the pretense that they belonged to the public, as confiscated; or that they were owned by disaffected persons or the like: they were sometimes carried off privately and by stealth, at other times openly and by violence: the former case is embraced by the word steal: the words next following repress the mischief of carrying slaves away by open force, or by persuasion, or by any other means than by stealth, accompanied nevertheless with an intention to appropriate to the taker's own use. The word "steal" does not include, *ex vi termini*, an intention to appropriate to his own use, or to sell and dispose of to another; and, therefore, the intention expressed in the act, if applied to the crime of stealing, is useless and redundant. But the other modes of taking away slaves, enumerated in the act, do not necessarily import the intention of selling them, or of appropriating them to their own use; nor are they, when unaccompanied by such intention, so detrimental or injurious. Of these offences, the intention forms a principal ingredient, and to them the words must be exclusively referred. I am consequently of opinion that the judgment ought not to be arrested.

HAYWOOD, J.—Concurred in the opinion that the judgment ought not to be arrested.

Reasons overruled.*

*The prisoner afterwards received sentence of death, and was executed.

NEWBERN DISTRICT, *September Term*, 1798.

JOHN HAYWOOD, Judge.

BLOUNT v. MITCHELL, and others.—Page 131.

No man can be allowed to assert a right to property by violence; hence if the owner of a slave, by force, take him from the possession of one who holds him, he is liable to an action of trespass.

A purchaser at a sheriff's sale is not bound to look farther than to see that he is an officer who sells, and that he is empowered to do so by execution.—He is not affected by the irregular conduct of the sheriff. When a sheriff levies on personal property, he should take it into actual possession, and have it present and shewn to the bidders at the time of sale.

Trespass for entry upon his close, and taking or carrying away a negro man called Robin, the property of the plaintiff. Plea, general issue.

The facts were, that Stanly obtained judgment against Blount for £444. A *fieri facias* issued thereupon, and the sheriff returned levied upon negroes, naming them, one of whom was the negro in question. Blount then obtained an injunction, upon the terms of paying £296 into the office of Clerk and Master; then the injunction was dissolved, and a *venditioni exponas* issued for the balance. The sheriff, without making any new seizure, and without taking into his possession the negroes named in the return upon the *fieri facias*, advertised them for sale, and on the day of sale, Blount tendered all the money mentioned in the *venditioni exponas;* which the sheriff would not receive, claiming

commissions on the £296, paid into the office, on the ground that he had been at the trouble of levying upon the negroes for that sum also.

The sheriff sold the negroes on the day mentioned in the advertisement, but they were not present, nor in his actual possession at the time, but in the possession of Blount.

Mitchell purchased the negro named in the declaration, and afterwards, in company with three other defendants, went armed in the night time to Blount's plantation, and carried away the negro; Blount never regained the possession of him since.

By the Court. Going upon the plantation of the plaintiff with force and taking away the negro by violence, is a trespass, and will subject the defendant to such damages as a jury may think proper to assess, even if the property vested in Mitchell by the sale; no man can be allowed to assert his right by violence. If the property did not vest in Mitchell by the sale, the jury should assess damages to the value of the slave. It is immaterial what passed between the sheriff and Blount; for, if the sheriff refused the money when he ought to have received it, and sold notwithstanding, the vendee's title may be good. He is to look no farther than that he is an officer who sells, and that he is impowered to do so by an execution. But then, the sheriff should have taken the property into his actual possession, and had it present at the time of the sale. I. Because personal property passes by delivery; II. Because he cannot sell a chose in action; III. For the benefit of the defendant, and to prevent fraud: lest by keeping the property out of view, he might cause it to sell for less than the value; as the purchaser would not be likely to give the full value for an article he had not an opportunity of seeing.

As the defendant's counsel is unprepared, having not expected the objection, I would recommend a verdict assessing the damages, upon the supposition that the property did not pass to the vendee, and also upon the supposition that it did: leaving it to the court to determine on which judgment shall be entered.

This proposition being agreed to by *Taylor* and *F. X. Martin*, for the plaintiff, and *Davie* and *Badger*, for the defendant, the jury found a verdict for £120 in the first case, and £20 in the second.

On the argument day, *The Court* said, that things sold by the sheriff ought to be actually seized and shewn to the bidders at the time of the sale, and to be delivered to the purchaser: that this point had been so decided in a late case in Wilmington District, *Bunting* v. *Smith;* which was a case similar to this in all points except this additional circumstance, that a third person who claimed the negro, had obtained possession of him and held him at the time of the sale by the sheriff.

Judgment for £120.

NOTE.—Upon the second point, see *Brodie* v. *Seagraves*, post, 144. *Jones* v. *Fulgham*, 2 Murph. Rep., 364. *Mordecai* v. *Speight*, 3 Dev. Rep., 428.

On the last point, see *Ainsworth* v. *Greenlee*, 3 Murph. Rep., 470. *Smith* v. *Tritt*, 1 Dev. & Bat. Rep., 241.

GENERAL RULE.—Page 134.

If a plaintiff die during the pendency of a suit, and his executors do not apply to carry it on within two terms after his death, computing from the day of his death, and not from the suggestion entered by the defendant, the cause will abate, and the defendant be discharged from further attendance.

But if, after this, the executors apply to be made parties by a *sci. fa.*, or notice served on the defendant, and they do not oppose it, and the plaintiffs are made parties by order of the court, it will be too late, afterwards, to move for an abatement; but the cause is to be tried.

NOTE.—See *Anonymous*, 2 Hay. Rep., 66.

WITHERINGTON, Ex'r of Ferguson v. ANN WILLIAMS.—Page 134.

A widow and two children were joint tenants of a slave; upon the marriage of the widow, the joint tenancy is severed between her and the children, and between the children by the act of 1784, (1 Rev. Stat., ch. 43, sec. 2;) and in trover by one of the children for the slave, he shall recover but one-third of the value.

Trover for a negro, not guilty pleaded. The defendant was the widow of one Ferguson, who was killed at the battle of the Allemance, leaving two children.

The Legislature, in order to make some provision for his family, directed that one hundred pounds should be deposited in the hands of Richard Caswell, to purchase negroes for the widow and children. Two negroes were purchased, one of whom died; the other was given by the defendant, after her marriage with Williams, to her son, the plaintiff's testator.

HAYWOOD, J. Mr. Caswell was trustee for the widow and children, to make the purchase; but having done so, the trust was at an end, and the property vested in them as joint-tenants. The joint-tenancy was severed as to the widow, by her intermarriage with Williams; as to the children, by the act of 1784, and each held a third in severalty. The gift by the defendant to the plaintiff's testator transferred no property, because her third belonged to Williams upon the intermarriage; and at the time of the gift to his representatives.

The plaintiff therefore is entitled to recover but one-third.

Judgment accordingly.

Taylor, for the plaintiff.
Davie, for the defendant.

EDENTON DISTRICT, *October Term*, 1798.

HARRAMOND v. McGLAUGHON.—Page 136.

If there be a variance between the natural boundaries and the courses and distances called for in a deed or grant, the former shall be preferred.

Ejectment. The plaintiff's grant, which was issued by the State in 1787, described a tract bounded by the river on one side, and thence from the river, so as to include a tract supposed to have been left out of the patent hereafter mentioned.

The defendant claimed under a patent issued fifty years ago, beginning at a hickory, standing not far from the river, thence down the river a certain course and distance. The course ran obliquely from the river, leaving between it and the river the triangular piece of land now sued for.

By the Court. When a deed, patent or grant describes a boundary from a certain point down a river, creek, or the like, mentioning also course and distance; should the latter be found not to agree with the course of the river, creek, &c., it ought to be disregarded, and the river considered the true boundary.

Verdict for the defendant.

NOTE.—See the cases referred to in the note to *Bradford* v. *Hill*, 1 Hay. Rep., 22, and the note to *Person* v. *Roundtree*, 1 Martin's Rep., 18.

SAWYER v. SEXTON'S ADM'R.—Page 137.

NOTE—See S. C. reported in 2 Hay. Rep., 67.

GRIER & CO. v. COMB'S ADM'RS.—Page 138.

Judgments obtained against an administrator in other suits, shall not be pleaded after the pleadings are once made up.

Motion for leave to plead several judgments recovered against the administrator, since the pleadings in the action were first made up. The pleas originally entered were payment *plene administravit*, no assets, no assets *ultra*, &c., judgments.

By the Court. When an executor or administrator has pleaded in chief to an action, having assets, both where the suit is commenced and the plea is pleaded, he cannot afterwards voluntarily pay them away; nor ought he to suffer other creditors to obtain judgments that will deprive him of them.

He can prefer one creditor to another, only before an action is commenced by either; or, when actions are commenced, by giving a judgment to one, before he pleads to the other's suit. After that period, he has no discretion, because the law prefers that creditor who first obtains a plea, provided he afterwards recovers judgment.

The allowance of this motion, would be in effect, to establish a contrary doctrine;—namely, that though an executor had assets at the commencement of the action, and also when he pleaded, yet at any distance of time afterwards he might prefer other creditors, by giving them

judgments, though, possibly, their debts were not due, when he pleaded to the first action.

Motion denied.

NOTE.—See *Woolford* v. *Simpson*, 2 Hay. Rep., 155, and the cases referred to in the note.

HARRELL v. ELLIOTT.—Page 139.

The private examination of a *feme covert*, as to the execution of a deed, cannot be proved by parol.

Ejectment. The land in question, had been devised to the plaintiff, then a feme sole, by her father; she afterwards married, and together with her husband, executed a deed, under which the defendant claims: the husband soon afterwards died. There was no endorsement on the deed purporting that the wife had been privately examined with respect to her consent; nor could any record to that effect be found.

The defendant offered one of the Justices of the court to prove that he had received the examination of the feme; but,

By the Court. What is done in court can only be proved by the records of the court; and though the act does not expressly require the woman's acknowledgment to be put into writing, or to be recorded, yet it is required that it should be made in court, and received by a member of the court. The evidence therefore cannot be received.

Verdict for the plaintiff.

WYNN'S EX'RS. v. BUCKETT.—Page 140.

A bond to keep the prison bounds need not be proved by the subscribing witnesses, for it must under the act authorizing it, be deemed a record, so far as concerns proof of its execution.

The defendant had executed a bond pursuant to the act of 1759, cap. 14, conditioned for keeping the prison bounds. Debt being brought thereon, the question was, whether it was incumbent on the plaintiff to prove the execution by the subscribing witness. The material words of the act are that the bond "shall be returned to the office of the clerk of the court whence the execution issued; and shall have the force of a judgment; and if any person who shall obtain the rules of any prison, upon giving bond and security as aforesaid, shall escape out of the same, before he shall have paid the debt or damages and costs, according to the condition of such bond, it shall be lawful, and full power and authority is hereby given to the court where such bond is lodged, upon motion of the party for whom such execution issued, to award execution against such person, &c."

By the Court. The meaning of the act is, that such bonds shall be considered as judgments, so far only as concerns the evidence necessary to prove them. It does therefore dispense with the proof of execution by the subscribing witness. They may be taken at a place so far distant from that where they were returnable, as to render it inconvenient to procure the attendance of witnesses. To avoid this difficulty, the bonds are to be returned by a sworn officer, and like recognizances may be carried to execution, without proving the obligor's acknowledgment. Further than this, the act does not invest these bonds with the qualities of a record: for notice must be given to the party, and the fact of breaking the prison bounds made out in evidence, before an execution can issue.

NOTE.—An action cannot be maintained upon a bond to keep the prison

bounds, for by the act it has the force of a judgment, and the creditor may have execution thereon, upon motion in court. 1 Murph. Rep., 421.

Halifax District, *October Term*, 1798.

STATE v. DEW.—Page 142.

A man indicted for murder cannot be bailed upon affidavits taken *ex parte* by persons not authorized to take them.

The prisoner having been indicted at the last term for murder, now appeared at the bar, and, upon motion of the Attorney General, was ordered into the sheriff's custody. It was moved by his counsel that he might be admitted to bail, on the ground of having voluntarily appeared, and upon some affidavits taken before Justices of the Peace, tending to shew that he was not guilty of the crime.

By the Court. It would be entirely irregular to bail a man indicted for murder, upon affidavits taken *ex parte*, by persons unauthorized to take them.

When a man is found guilty by a coroner's inquest, the court may look into the depositions returned; and if it appear that the jury have drawn wrong inferences, may admit the prisoner to bail: but the secrecy which accompanies the evidence delivered to the Grand Jury precludes the court from knowing its amount.

Bail refused.

KILLINGSWORTH v. ZOLLIKOFFER.—Page 143.

Slaves sent to the husband by the wife's father soon after marriage are presumed to be given.

Detinue for negroes. Killingsworth married the daugh-

ter of the defendant, and, in about ten days afterwards, the negroes in question, which before the marriage were Zollicoffer's, were in the possession of the plaintiff and so continued till after the wife's death, which took place about a year after the marriage, and afterwards the negroes continued in his possession a year or two, when they were again in the possession of Zollicoffer, who detains them: but whilst in the possession of the plaintiff, he, the plaintiff, expressed doubts about his title, saying he did not know whether, or not, he could lawfully sell them.

Daniel, for the plaintiff, cited and relied on the case of *Carter's Executors* v. *Rutland*, Haywood's Rep., 97.

Baker, for the defendant, agreed that the case of Carter's Ex. and Rutland went upon a presumption that the negroes were intended as a gift by the father, which presumption can only stand until the contrary appears: and in this case, there are circumstances strong enough to overturn the presumption; the doubts expressed on two several occasions by the plaintiff with respect to the validity of his title; and another circumstance, that one of the negroes in question was at the time of this pretended gift, in controversy between a third person and the now defendant; which proves that he could not have intended a gift.

By the Court. The case cited for the plaintiff is now the established law, and it governs the present suit.

Verdict for the plaintiff.

NOTE.—See *Farrell* v. *Perry*, 1 Hay. Rep., 2, and the note thereto.

BRODIE v. SEAGRAVES.—Page 144.

If by consent a large quantity of effects are put up together, sold at one bid and purchased by the plaintiff, who colludes with the defendant to defeat the claims of the other creditors, the sale is void.

A purchaser at an execution sale is not affected by the irregular conduct of the officer.

Brodie had obtained a judgment against Finch, taken out execution and carried it to be levied on his effects; on the day appointed for the sale, they conversed privately together, and the goods seized were sold by the constable, all together at one bid, namely, the standing corn, household furniture and the tobacco; and Brodie became the purchaser: it was understood at the time, by those present, that Brodie intended to get satisfaction out of part of the goods, and to release the residue; and in consequence of this understanding, one of the witnesses forebore to bid. All the goods purchased were, after the sale, left by Brodie in Finch's possession; who prepared the tobacco for market, and was carrying it to Virginia, when another creditor, one Lees, obtained judgment against him. The execution was levied by the defendant, Seagraves, a Constable, who seized the tobacco and sold it; having first offered Brodie to pay the amount of his judgment, costs, &c., out of the tobacco, which Brodie refused.

Haywood, J. Supposing the Constable to have sold in the manner here stated, of his own accord, though the sale was irregular, still the property vested in the vendee; but if he sold pursuant to an agreement between Brodie and Finch, then the unusual manner of the sale, and the setting up of all the goods at once to be disposed of, at one bid, (especially in this under-hand way, to make the goods sell at a great under-value and consequently to disappoint some creditor who afterwards might have claimed satisfaction of

his debt also,) as an evidence of fraud which is to be collected from circumstances, and will vitiate the sale *in toto*.

Verdict and judgment for the defendant.

NOTE.—On the first point, see *Jones* v. *Fulgham*, 2 Murpy. Rep., 364. On the other point, see *Blount* v. *Mitchell*, ante 131, and the note thereto.

WILMINGTON DISTRICT, *November Term*, 1798.

ANONYMOUS.—Page 146.

The Superior Courts cannot reverse one of their judgments given at a former term for error in a matter of law; but if it be absolutely void, or taken irregularly against the known rules of the court, they will set it aside at any time on motion.

The plaintiff had taken a capias which was returned *non est inventus;* then an attachment, upon which the Sheriff returned "levied on two negroes, but not taken into custody because there was no jail of the county to keep them in;" upon this return, the plaintiff took a judgment by default and afterwards executed a writ of inquiry and had judgment final, and now,

Hill, for the defendant, moved to set it aside for irregularity, and he produced an affidavit of the defendant stating that he had not any notice of these proceedings.

Jocelyn, for the plaintiff. The judgment was obtained a term or two ago, and cannot now be set aside unless by a writ of error.

HAYWOOD, J.—When this court passes a judgment, and the term expires, it cannot, in general, be set aside but by a writ of error: and then only in a case where the error is in a matter of fact, to be tried by a jury. If the error be in a matter of law, this court cannot reverse its own judgment for any such error; for then proceedings would be endless: but if the judgment be absolutely void, being

given against a person who was not served with process; or if it be taken irregularly against the known rules of the court, it may be set aside at any time on motion.

Here the property was not taken into the actual custody of the officer; had it been so, the law supposes notice would have come to the defendant; and without such actual taking of the property levied on, into the officer's custody, the attachment is not well executed, and does not bring the defendant into court: consequently this judgment was irregular, having been taken against one not in court, and must therefore be set aside.

Judgment set aside.

NOTE.—See *Devany* v. ———, 2 Hay. Rep., 239, and the note thereto.

NEWBERN DISTRICT, *March Term*, 1800.

JOHN LOUIS TAYLOR, Judge.

LABAT v. ELLIS.—Page 148.

Where the plaintiff sued in his surname with his title of curtesy, and there was a plea in abatement that his Christian name was not inserted; a replication that he was as well known by his title of curtesy as by his Christian name is bad.

The defendant pleaded in abatement that the plaintiff's Christian name was not inserted in the writ. The fact was that the plaintiff was a Frenchman, residing abroad, and his attorney, being unacquainted with his Christian name, had filled the writ in the name of Monsieur Labat.

The plaintiff replied that he was as well known by the name of Monsieur Labat, as by his Christian or other name. Demurrer.

By the Court. The plaintiff does not deny that he has

a christian name. We are therefore to presume that he has one: that being the case, he ought to have described himself by it.

Writ abated.

Slade, for the plaintiff.
F. X. Martin, for the defendant.

BENNERS v. HOWARD'S EX'RS.—Page 149.

On a promise to deliver goods, a demand before action brought is indispensably necessary.

A special verdict had been found in this case stating, in substance, that in June, 1788, the plaintiff lent to the defendants' testator thirty barrels of rosin; that the defendants' testator died in December, 1790, and the writ was taken out in June, 1792. The question was, whether the writ was a sufficient demand.

By the Court. Where a promise is, to pay a sum of money, but no time is mentioned, it is due presently, and an action lies without any request. But where, under the like circumstances, a promise is made, to deliver goods, or to do a collateral act it is necessary that the party to whom it is to be done, should make a demand of the promiser before an action is brought. Though no express promise be made in the present case, the law implies that the borrower should restore in kind the thing borrowed, on request, or pay the value in damages; but, to maintain a suit for the latter, the request is indispensably necessary.

Judgment for the defendant.

Slade, for the plaintiff.
Graham, for the defendant.

NEWBERN DISTRICT, *January Term*, 1801.

JOHN LOUIS TAYLOR, Judge.

ANONYMOUS.—Page 150.

If the nominal plaintiff reside out of the State, the defendant may be sued out of his own district if the suit be brought in the district in which the real plaintiff is an inhabitant.

Assumpsit on notes of hand. The defendant pleads in abatement of the writ, that when it was sued out he was an inhabitant of, and resident in, the district of Wilmington; that the plaintiff was an inhabitant of the State of Tennessee, and that the parties continue to reside in the said places respectively—wherefore the defendant saith he is not bound to answer the writ, out of the district of Wilmington. Replication—that William M'Kenzie, who lives in the county of Beaufort and district of Newbern, is the holder and owner of the notes on which the suit is brought, and the real plaintiff in the suit, making use of Blount's name only for the purpose of recovering; and that he was, previously to the commencement of the suit, known and acknowledged by the defendant to be the real owner of the note, and entitled to the money due thereon; and was treated with by the defendant for the discharge of the notes.

Demurrer and joinder.

By the Court. There are cases where a court of law has taken notice of equities and trusts for the furtherance of justice; to enable a defendant to set off a debt due from the person beneficially interested, though no party to the record, and for the purpose of avoiding the plea of bankruptcy. I think the principle may be adopted with equal propriety to avoid a plea to the jurisdiction of the court, grounded on the

act of assembly—for it stands admitted on these pleadings that Blount is but nominally the plaintiff.

Demurrer overruled.

Harris, for the plaintiff.
Woods, for the defendant.

WILMINGTON DISTRICT, *May Term*, 1801.

JOHN LOUIS TAYLOR, Judge.

HOSTLER'S ADM'R v. SKULL.—Page 152.

Trover is founded on the right of property exclusively, and therefore the plaintiff cannot recover, if defendant prove property in another when the conversion took place.

Trover for a negro: not guilty, pleaded. The plaintiffs were possessed of the slave in question, from 1787 until 1794, when he came into the possession of the defendant, who converted him to his own use. It appeared that the slave belonged to the estate of John Vernon, deceased, upon whose goods, &c., the defendant obtained administration in 1798, since the institution of this action; and he now offered in evidence the letters of administration.

The plaintiff's counsel objected to this evidence, on the ground of its having no relation to the question now to be decided; which is, whether the defendant had any right to the property during the continuance of the plaintiff's possession. At that time, the defendant had no claim upon the negro, or right to disturb the plaintiff's possession; which, however acquired, he might maintain against all but the true owner.

By the Court. The issue joined in this case is, whether the defendant is guilty of converting to his own use the plaintiff's property. The former offers to shew that he is the person who, at present, has the right both of possession

and of property; and it is clear upon the evidence adduced, that the plaintiffs had neither, when the defendant obtained possession of the slave.

Possession alone will enable a person to maintain an action of trespass against a stranger; and then damages are given for the tortious taking; all claim to which is waived, by bringing an action of trover. It is a fundamental distinction between the two actions, that the one is founded in property; the other, in possession: and it is necessary to attend to this, because a recovery in trover vests the property sued for in the defendant. Hence if the general property be in one person and the special property in another, a recovery in trover by the latter against a stranger, will deprive him who has the general property of his right of action.

But a recovery in trespass is not a bar to an action of trover, unless the property has come in question, and has been decided on; for though trover will lie in all cases where trespass will; yet the latter may be brought in certain cases, where trover will not lie. In the present case, for example, the plaintiff might have maintained trespass against the defendant, who was a wrong-doer in disturbing the possession; but an action fitted for disputing and trying the right is improper, where the alleged injury is to the possession only.

Whenever it is said in the books that possession alone gives a sufficient right to maintain trover against all persons except the true owner; it is to be understood, as I conceive, of a possession accompanied, either with a general or special property, whether the latter be acquired by finding or by a bailment from the true owner. For while the true owner is unknown, the finder of a chattel is apparently the owner, since the means by which he acquired it are lawful; and the owner's consent to his possession may be implied: but that, in an action of trover by the finder against a stranger, evidence is admissible that the ownership is in a third person who does not consent to the plaintiff's action, appears to me perfectly consonant with the principles upon which this action is founded. And it is held, in some late adjudications, that the right of present possession, as well as that of prop-

erty, is necessary to maintain the action of trover. For these reasons, I think the evidence is proper to be received in connection with the proof that the slave belonged to John Vernon's estate.

Evidence admitted.

Haywood, for the plaintiff.
Duffy, for the defendant.

NOTE.—See S. C. on a new trial reported in 2 Hay. Rep., 179, and the note thereto.

QUINCE'S ADMR'S v. MARY ROSS'S ADMR'S.—Page 155.

A writ sued out against a person who was named executor but renounced the office, is not evidence to rebut the presumption of the payment of a bond twenty years old.

Debt upon a bond, to which the defendant pleaded "*solvit ad diem*," and relied upon the presumption of payment, from the length of time elapsed since the bond was given. Deducting the time between the sixth of March, 1773, and the first of June, 1784, there were twenty-six years to support the presumption.

In order to rebut this presumption, the plaintiff proved, that in 1796 he had instituted a suit against a person, as executor of Mrs. Ross, who pleaded that he never was an executor, but had renounced the office; whereupon the suit was discontinued.

By the Court. Twenty years are considered sufficient to induce a presumption of the payment of a bond; where no interest has been paid, or demand during that time; and how far these circumstances have a tendency to weaken the presumption, is proper for the consideration of the jury, under the circumstances of each case.

With respect to the demand relied upon by the plaintiff,

I do not think it is entitled to any weight, having been made of a person, wholly unconnected in the transaction; a fact which might have been ascertained by examining the records of the County Court. A writ sued out against the party really liable, though he should not be arrested upon it, if the transaction were *bona fide*, would go a great length in defeating the presumption; so would an imperfect writ, if the proper party were arrested upon it: but this is demanding from one man the debt of another.

Verdict for the defendant.

Jocelyn, for the plaintiff.
Gaston, for the defendant.

NOTE.—See S. C. as reported in 2 Hay. Rep., 180, and the note thereto.

NEWBERN DISTRICT, *July Term*, 1801.

DEN ON DEM. OF HANKS v. TUCKER.—Page 157.

NOTE.—See S. C. reported in 2 Hay. Rep., 147.

STATE v. STREET.—Page 158.

In an indictment for forgery the omission of a figure in the description of the instrument forged is fatal.

The defendant was indicted on the statute of 5 Eliz., cap. 14, for forging a deed, purporting to be sealed and delivered by James Houston, to the prisoner Samuel Street, for a tract of land on the South side of Neuse River, beginning at a

stake, in the aforesaid Street's ne, running South, *twenty* West, to a pine, &c.

The deed produced corresponded with that recited in the indictment, except in the description of the courses, which in the first line was South *twenty two* West, instead of South *twenty* West.

Gaston, for the prisoner. The cases to be found in the books on the subject of variance, even in relation to contracts and civil proceedings, will go the length of shewing this mistake to be fatal: but with respect to criminal proceedings, the law requires still greater strictness, and wil not allow so severe a punishment, as this statute denounces, to be incurred, under an indictment which is not supported in all its material parts.

The charge against the prisoner is for forging a deed, which purported to be a conveyance of a tract of land, circumscribed by the boundaries specified in the indictment; but the State is about to prove him guilty of forging a deed for a tract of land differently bounded; and from this variance in the courses there results, also, a difference in the quantity. The mis-recital extends beyond the mere form of the deed, and affects the substance itself. Hence it will be found that none of the cases will warrant the court to intend, that the deed produced is the one alleged, because the fault consists in a variance of sense, and of a thing material. The figure which is omitted, cannot be supplied, on the principle that the word "*despaired*" was supplied in an indictment of perjury, which undertook to recite a former indictment for an assault; as in the case of the *King* v. *May*, Douglas, 183; because the indictment in the present case has a plain, consistent meaning. Nor can it be supplied on the ground that the letter "S." was in the case of the *King* v. *Beach*, Cowper, 229; for here the omission of the figure changes the sense. Lee's case in Leach, 353, and Cogan's case, Ibid., 389, are authorities in point to show that this variance is fatal.

The Attorney General, after noticing the distinction between undertaking to recite the tenor of an indictment,

and the substance, as in the present case submitted the question.

The Court directed the jury that the proof was insufficient to authorize a lawful conviction of the prisoner upon the indictment. That the variance was in a substantial part, and the omission of the figure could not be supplied, by any construction warranted by the principles of law.

Verdict, not guilty.

NEWBERN DISTRICT, *January Term*, 1802.

SAMUEL JOHNSTON, Judge.

MILLER v. WHITE.—Page 161.

NOTE.—See S. C. more fully reported, post 309.

HILLSBOROUGH DISTRICT, *April Term*, 1802.

JOHN LOUIS TAYLOR, Judge.

GOBU v. E. GOBU.—Page 164.

Negroes are presumed to be slaves until the contrary appears; not so with respect to persons of mixed blood.

Trespass and false imprisonment; plea that the plaintiff is a slave: replication and issue.

It appeared in evidence that the plaintiff, when an infant, apparently about eight days old, was placed in a barn by some person unknown: that the defendant, then a girl of about twelve years of age, found him there, conveyed him home, and has kept possession of him ever since; treating him with humanity, but claiming him as her slave. The plaintiff was of an olive colour, between black and yellow, had long hair and a prominent nose. The case was argued by

L. Henderson for the plaintiff and *Haywood* for the defendant; after which the following observations were made to the jury.

By the Court. I acquiesce in the rule laid down by the defendant's counsel, with respect to the presumption of every black person being a slave. It is so, because the negroes originally brought to this country were slaves, and their descendants must continue slaves until manumitted by proper authority. If therefore a person of that description claims his freedom, he must establish his right to it by such evidence as will destroy the force of the presumption arising from his color.

But I am not aware that the doctrine of presuming against liberty, has been urged in relation to persons of mixed blood, or to those of any color between the two extremes of black and white; and I do not think it reasonable that such a doctrine should receive the least countenance. Such persons may have descended from Indians in both lines, or at least in the maternal; they may have descended from a white parent in the maternal line or from mulatto parents originally free, in all which cases the offspring, following the condition of the mother, is entitled to freedom. Considering how many probabilities there are in favor of the liberty of these persons, they ought not to be deprived of it upon mere presumption: more especially as the right to hold them in slavery, if it exists, is in most instances, capable of being satisfactorily proved.

Verdict that the plaintiff is free.

NOTE.—See acc. *Scott* v. *Williams*, 1 Dev. Rep., 376.

WILMINGTON DISTRICT, *May Term*, 1802.

SAMUEL JOHNSTON, Judge.

JASON WALLS v. LEVI NEWBOLD.—Page 166.

NOTE.—See S. C. reported in Conf. Rep., 375.

CASES

DETERMINED IN THE

COURT OF CONFERENCE.

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CASES FROM WILMINGTON, *December Term*, 1801.

SAMUEL CAMPBELL & WIFE v. ALICE HERON, WIDOW JOHN LONDON & JOHN LONDON, JUN.—Page 199.

NOTE.—See S. C. reported in Conf. Rep., 291.

CUNNINGHAM'S HEIRS v. CUNNINGHAM'S EX'RS.—Page 209.

NOTE.—See S. C. reported in Conf. Rep., 353.

CASES FROM HALIFAX, *December Term*, 1801.

JONATHAN DAVIS & WIFE AND MARY DUKE v. GREEN DUKE, Adm'r of William Duke.—Page 213.

NOTE.—See S. C. reported in Conf. Rep., 361.

STATE v. JEFFRIES.—Page 216.

NOTE.—See S. C. reported in Conf. Rep., 364.

WILLIAMSON'S ADM'RS v. SMART and KILLBEE.—Page 219.

NOTE.—See S. C. reported in Conf. Rep., 146.

CASES FROM HILLSBOROUGH, *December Term*, 1801.

WILKINSON, Assignee v. WRIGHT.—Page 227.

NOTE.—See S. C. reported in Conf. Rep., 341.

KENNON v. DICKENS.—Page 231.

NOTE.—See S. C. reported in Conf. Rep., 357.

BROOKS v. COLLINS.—Page 236.

NOTE.—See S. C. reported in Conf. Rep., 345.

STATE v. BOON.—Page 246.

The act of 1791 relative to the killing of slaves is too uncertain to warrant the court in passing sentence of death upon prisoner convicted under it.

The prisoner was indicted on the third sec. of the act passed in 1791, the words of which are, "that if any person shall be hereafter guilty of wilfully and maliciously killing a slave, such offender shall upon the first conviction thereof be adjudged guilty of murder, and shall suffer the

same punishment as if he had killed a free man, any law, usage or custom to the contrary notwithstanding."

The prisoner was found guilty by a Jury in Hillsborough Superior Court, and being brought up to receive judgment, several exceptions were taken in arrest, by his counsel, upon which the presiding judge directed the case to be sent up to obtain the opinion of this Court. The case was ably argued by *Haywood* and *Duffy* for the prisoner, and the *Attorney General* for the State.

The following authorities were cited in behalf of the prisoner: 2 Hale's Pl. Cor., 334; Kelyng, 104; 4 Bl. Com., 98, 366; 2 Hawk., 446.

Hall, J. The prisoner has been found guilty of the offence charged in the indictment; whether any, or what punishment, can be inflicted upon him, in consequence thereof, is now to be decided. I will first consider, whether we have any authority to inflict punishment upon him, from any Act of Assembly.

The Legislature in the year 1774, passed an Act, entitled an act to prevent the wilful and malicious killing of slaves; by which they annexed the punishment of one year's imprisonment to the commission of the first offence; and have declared that the person upon a second conviction thereof, shall be adjudged guilty of murder, and shall suffer death without benefit of clergy. In the year 1791, another act was passed, for the purpose of examining this Act. The preamble of which, sec. 3, expresses "that whereas by another Act of Assembly passed in the year 1774, the killing of a slave, however wanton, &c., is only punishable in the first instance by imprisonment, &c., which distinction of criminality between the murder of a white person, and one who is equally a human creature, &c., is disgraceful to humanity, &c., be it enacted, &c., that if any person shall hereafter be guilty of wilfully and maliciously killing a slave, such offender shall upon the first conviction thereof be adjudged guilty of murder, and shall suffer the same punishment as if he had killed a free man." If we consider that the mildness of the punishment directed to be inflicted upon the first conviction,

&c., by the former Act, is what the latter Act in its preamble, sec. 3, complains of, and go no further, our impression at once would be, that we had not only power to inflict a punishment upon the prisoner, but also, a greater one than was annexed to the offence by the Act of 1774. But the preamble of a statute is no part of it; 6 Mod., 62. Although it is often proper, to put such construction on a statute, as will agree with the preamble, yet it ought not to be done, when thereby, the enacting clause would be confined to it; 8 Mod., 144.

We must then consider the words of the enacting clause, without regard to the preamble, in case they cannot be reconciled. If any person hereafter shall be guilty of killing a slave, &c., such offender shall be adjudged guilty of murder, &c., and shall suffer the same punishment, as if he had killed a free man. In case the person had killed a free man what punishment would the law have inflicted upon him? Before this question can be solved another must be asked; because upon that the solution of the first depends. What sort of a killing was it? or what circumstances of aggravation or mitigation attended it? did the act bespeak such depravity of heart, as would stamp it with the name of murder? or were they such as justified it? If of the former sort, capital punishment should be inflicted upon the author of it; if of the latter sort, he is guiltless. That to which the Legislature referred us for the purpose of ascertaining the punishment, proper to be inflicted, is in itself, so doubtful and uncertain that I think no punishment whatever can be inflicted; without using a discretion and indulging a latitude, which in criminal cases, ought never to be allowed a Judge.

It may be thought that the words "shall suffer the same punishment as if he had killed a free man," from the connexion in which they stand with the words preceding them in the same clause, viz., "that if any person shall hereafter beguilty of wilfully and maliciously killing a slave" should be allowed to have this meaning, and "shall suffer the same punishment, as if he had wilfully and maliciously killed a free man." I cannot agree to this construction;

because it is a rule, that penal statutes should be construed strictly; 1 Bl. Com., 88. Much latitude of construction ought not to be permitted to operate against life; if it operate at all, it should be in favor of it. Punishments ought to be plainly defined and easy to be understood; they ought not to depend upon construction or arbitrary discretion.

Perhaps the Legislature did intend, that those words should convey that meaning; but it is not certain that such was their intention; if it was, it might have been easily expressed; and indeed, if it were so expressed, it would not be altogether free from uncertainty. But suppose that to have been their intention, and that intention plainly expressed and free from uncertainty; is the benefit of clergy taken away? It is laid down in 2 Hale, 330, that where a statute makes a new felony, clergy is incident thereto, unless it be especially taken away by Act of Parliament. This doctrine is recognized by Sir William Blackstone in the fourth book of his commentaries, page 98; but I think it unnecessary to consider this part of the case now; because, for the reasons given, I do not feel myself authorized by the Act of Assembly, to say that any punishment should be inflicted on the prisoner. I will only add, that our Legislature seem to have also recognized the doctrine laid down by Ld. Hale, because in the Act of 1774, before spoken of, the benefit of clergy is taken away in express words, upon a second conviction, &c.; the same thing is evidenced by many other Acts of Assembly.

II. But it has been also contended, on behalf of the State, that the offence with which the prisoner is charged, is a felony at common law, and that having been found guilty by the jury, he ought to be punished, independently of any Act of Assembly on the subject. This question arises out of the peculiarity of our situation; slavery not being known to the laws of England, from them we cannot derive our usual information. Sir William Blackstone says, liberty is so deeply implanted in the English Constitution, that the moment a slave lands there, he falls under the protection of the laws, and so far becomes a free man; though the master's

right to his service may possibly continue ; 1 Bl. Com., 127. From this expression, I understand the author's meaning to be, that the reason why the laws extend their protection to a slave is, because the moment he lands in England he undergoes a change, his condition is ameliorated, and in contemplation of law, at least, he is no longer a slave, but a free man. If this be the reason, why a slave comes within the protection of the laws of England, it would follow, that if a slave were carried there, and his condition of slavery were not altered, the laws would not extend their protection to him; because a slave in a pure state of slavery, has no rights. President Montesquien, in his Spirit of Laws, Vol. I., Book 15, cap. I., and Sir William Blackstone in his Commentaries, Vol. I., 423, define pure slavery to be, that whereby an absolute power is given to the master, over the life and fortune of the slave. In some countries where slavery has existed, laws have been made from time to time, ameliorating its condition ; the power of taking away their lives, or cruelly treating them, has sometimes been restrained : these restraints, we find, were the consequence of positive laws : they did not exist before these laws imposed them : they were unknown in a pure state of slavery. It is said in Co. Litt., 116, *b*, that he that was taken in battle, remained bond to his taker forever, and he could do with him as with his beast ; he could kill him with impunity, &c. Afterwards we find it ordained, that the life of a villein was not in the power of his lord ; that he that killed his villein, should have the same punishment as if he had killed a freeman. The lord could not maim his villein ; if he did, the King would punish him for maiming his *subject ;* because he disabled him, so that he could not do the King service ; Co. Litt., 127, *a.* Villeinage however, as it existed in England, reflects but little light on our subject ; it had, attached to it, certain rights, that were unknown to a pure state of slavery. We have seen, that a villein is called the King's subject ; that the King has a right to exact services from him ; the lord's power over him was not absolute : a villein could not sue his lord, but could bring all manner of actions against every other person ; he might have an action of

appeal against his lord for the death of his father, &c.; Litt., sec. 189: he might be an executor, and in that capacity sue his lord; sec. 191.

Slaves in this country possess no such rights; their condition is more abject; 2 Sal., 666; they are not parties to our constitution; it was not made for them. What the powers of a master were over his slave, in this country, prior to the year 1774, have not been defined. I have not heard, that any convictions and capital punishments took place before that period, for killing of negroes. By an Act of Assembly, passed in April, in the year 1741, cap. 24, sec. 54, it is declared that if, in the dispersing of any unlawful assemblies of rebel slaves, &c., apprehending runaways, &c., in correction, &c., any slave shall happen to be killed or destroyed, &c., the court of the county, &c., shall put a valuation upon such slave. In the next succeeding section it is declared, that nothing herein contained, shall be construed, deemed, or taken to defeat or bar the action of any person, whose slave or slaves shall happen to be killed, by any other person whatsoever, contrary to the directions, &c., of this Act; but all and every owner, &c., shall and may bring his, her or their action for recovery of damages, for such slave or slaves so killed. From this part of the Act it appears, that before the Act passed, an action could have been sustained, by the owner of a slave, against any person who killed him: the sole object of the last section is to fix such a construction on the first, and so to explain it, as that such action thall not be defeated or barred. It does not give the action, which before would not lie, but guards it from such construction as would tend to narrow its operation. If then, this action could have been sustained, it must have been on the ground, that slaves were considered as chattels. Killing a person may amount to felony or not, as the circumstances of the case may be, that attend it. I understand that this action was sustainable in all cases of a killing of slaves, except in the cases provided for in the 54th sec. If the killing of a slave, should be considered a felony at common law, in case it was done under the same circumstances of aggravation, as in

the case of a free man, would amount to felony, what would be the result? the person offending would be answerable, both *civiliter* and *criminaliter*. The trespass or civil injury would not be extinguished in the felony; but it would depend upon accident, whether a recovery could be effected or not. If the indictment should be first tried, and the prisoner found guilty and executed, the action would be at an end: *actio personalis moritur cum persona*, and I take that to be such an action as the maxim would bear upon. These are consequences I cannot be led to believe the Legislature intended to give rise to; that they did not may be further ascertained from the act passed in the year 1774, before mentioned: where it is mentioned, that if any person shall be guilty of wilfully and maliciously killing a slave, &c., such offender shall suffer twelve months' imprisonment, and upon a second conviction, shall be adjudged guilty of murder, and shall suffer death without benefit of clergy; in 3 sec. it is further declared, that such offender shall, on the first conviction thereof, pay the owner such sum as shall be the value of such slave; it is not expressed what compensation shall be made to the owner upon a second conviction, when the offender is to suffer death; nor does the act of 1791 direct that compensation shall be made to the owner, by the offender. So that, it does not appear that the Legislature had an idea that the offender should suffer death and also make compensation to the owner of the slave; which we have seen would have been the case, if the killing of a slave had been felony at common law.

The act, passed in the year 1774, is entitled an act to prevent the wilful and malicious killing of slaves. If it was a felony at common law to do so, the punishment due to it was greater than that inflicted by this act. I admit that nothing decisive of the question is to be collected from the preamble, which expresses that doubts existed as to the punishment proper to be inflicted; it is true the Legislature might have thought that the punishment of death for the first offence was too severe, and therefore not proper to be inflicted; and in lieu of it, have substituted one year's imprisonment.

The Legislature declare, in the act passed in the year 1791, sec. 3, that the punishment inflicted by the act passed in the year 1774, is too mild; and no doubt they intended, for the first offence, to inflict the punishment of death upon the first conviction; if so, and it was a felony at common law to kill a slave, under any circumstances which, in the case of a free man, would amount to felony, would not the same end have been answered by repealing the act of 1774, and leaving the offence to be punished at common law, instead of passing an act, intended to speak the same language and to inflict the same punishment, as was spoken and inflicted by the common law?

I have taken this view of the acts of Assembly, to ascertain, as well as I could, the opinion entertained by the Legislature on the latter question. From the consideration which I have given the whole case, if I ever felt disposed to act the most rigid part towards the prisoner, the most I could say, and the greatest length I could go, would be, that it is doubtful whether the offence with which he is charged is a felony at common law or not. If it is doubtful whether he ought to be punished or not, that, certainly, is a sufficient reason for discharging him; crimes and punishments ought to be ascertained with certainty. Feeling, however, as I do, but little doubt, I cannot hesitate to say, that he ought to be discharged.

Johnston, J. The murder of a slave, appears to me, a crime of the most atrocious and barbarous nature; much more so than killing a person who is free, and on an equal footing. It is an evidence of a most depraved and cruel disposition, to murder one, so much in your power, that he is incapable of making resistance, even in his own defense: and if, at any time, his conduct becomes so obnoxious that it cannot be longer borne by his master, he has it in his power to dispose of him and remove him to any distance he thinks proper. It is unnecessary to consider what punishment was annexed to the murder of slaves in other countries, either in ancient or modern times; the definition of murder, as laid down in our books, applies as forcibly to the

murder of a slave as to the murder of a freeman; and had there been nothing in our acts of Assembly, I should not hesitate on this occasion to have pronounced sentence of death on the prisoner.

But the act of 1791, chap. 4, sect. 3, after enacting "that if any person hereafter be guilty of wilfully and maliciously killing a slave, such offender shall, upon the first conviction thereof, be adjudged guilty of 'MURDER;'" had the act of Assembly stopped here, there could have been no doubt in the present case; but, when it goes on further to assign the punishment, it enacts in these words: "and shall suffer the same punishment as if he had killed a free man." The killing of a free man is punished in different ways, and, in some cases, no punishment is annexed to it; as where a man kills another by accident, or as it is expressed in our books *per infortunium;* or where a man kills another in his own defense. From the context, and taking every part of the section under consideration, there remains no doubt in my mind respecting the intention of the Legislature; but the judges in this country as well as in England, have laid down, and invariably adhered to, very strict rules in the construction of penal statutes, in favor of life; such as, that the words should be taken in *mitiori sensu*, where they are doubtful, or will admit of various consrctutions; and that nothing shall be taken by construction, implication, or reference, from the context.

Under these considerations; under the influence of the decisions of the most respectable judges as reported in all the books which treat of the criminal law, though not without a considerable degree of reluctance, I am of opinion that the judgment in this case should be arrested.

TAYLOR, J. I cannot yield my assent to the position, that a new felony is created by the act of 1791, or that any offence is created, which did not antecedently exist. For the killing of a slave, if accompanied with those circumstances which constitute murder, amounts to that crime, in my judgment, as much as the killing of a free man.

What is the definition of murder? The unlawful killing

of a reasonable creature within the peace of the State, with malice aforethought. A slave is a reasonable creature; may be within the peace; and is under the protection of the State; and may become the victim of preconceived malice. Upon what foundation can the claim of a master to an absolute dominion over the life of his slave, be rested? The authority for it, is not to be found in the law of nature, for that will authorize a man to take away the life of another, only from the unavoidable necessity of saving his own; and of this code, the cardinal duty is, to abstain from injury, and do all the good we can. It is not the necessary consequence of the state of slavery, for that may exist without it; and its natural inconveniences ought not to be aggravated by an evil, at which reason, religion, humanity and policy equally revolt. Policy may occasionally dictate the propriety of enhancing or mitigating the punishment; may at one time subject the offender to a year's imprisonment, and at another to death; yet amidst all these mutations the crime is unchanged in its essence, undiminished in its enormity. The scale of its guilt exists in those relations of things which are prior to human institutions, and whose sanctions must forever remain unimpaired.*

It cannot be distinctly inferred from the act of 1774, that the Legislature of that period doubted whether this amounted to murder at common law; they do indeed state, in the preamble of that act, that some doubts have arisen, with respect to the punishment proper to be inflicted upon those guilty of the offence; but such doubts resulting from considerations of a political nature, may very well consist with an entire conviction, that the crime is murder at common

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* According to Judge Blackstone, the principal efficacy of human laws consists in restraining the conduct of men, as to indifferent points; but, he adds, "with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination to, the divine and natural law. To instance in the case of murder: this is expressly forbidden by the divine and demonstrably by the natural law; and from these prohibitions arises the true unlawfulness of this crime. Those human laws, that annex a punishment to it, do not at all increase its moral guilt, or superadd any fresh obligations *in foro conscientiæ* to abstain from its perpetration." 1 Com., 43.

law. Doubtless, they may ordain whatever punishment they think fit for every crime; they may at one time deem imprisonment sufficiently severe to repress the crime of killing a slave: when perhaps a different state of things may at another period, suggest the necessity of an increased severity. But their adopting the lighter punishment, does not imply that, before the time of adoption, the act was without guilt. To pursue the argument in its consequences, it will follow, that from the first settlement of this State, until the year 1773, no act of the Legislature having passed upon this subject, the crime of killing a slave with malice, was not punishable as homicide. The contrary conclusion appears to me most just: namely, that the crime was comprehended under the common law definition of murder, which the statutes of 23 Hen. 8, and 1 Ed. 6, deprived of clergy; that it never ceased to be so considered: but in 1774, the Legislature thought proper to mitigate the punishment of the first offence, from death to imprisonment; reserving the common law punishment of death to the second conviction. So it remained until 1791, when the Legislature aimed to restore the former punishment, by the act upon which this prisoner is indicted. The principle relied on is quite correct, that whenever an offence is made felony by statute, it shall have the benefit of clergy, unless it be expressly excluded from it; and in all felonies clergy is allowable, unless taken away by statute; but the act of 1791, repealing that of 1774, necessarily revived the operation of those statutes by which murder is deprived of clergy, and if this act had been a simple repeal, or sufficiently explicit in other respects, judgment of death must have been pronounced against the prisoner. But when the court is called upon, under an act of Assembly, to pronounce the highest punishment known to the law, they must be satisfied that the language used is clear and explicit to the object intended. For if it admits of two constructions, that must be adopted which is favorable to the prisoner. On this ground, therefore, and the reasons given by the rest of the court, I think no judgment can be pronounced.

Macay, J. This indictment is grounded on the 3 sec. of the act of the General Assembly, passed in 1791, entitled an act to amend an act, entitled an act to prevent thefts and robberies by slaves, free negroes and mulattoes, passed in 1787, and to amend an act, passed in 1774, entitled an act to prevent the wilful and malicious killing of slaves.

The third section enacts that if any person shall hereafter be guilty of wilfully and maliciously killing a slave, such offender shall, upon the first conviction thereof, be adjudged guilty of murder, and shall suffer the same punishment as if he had killed a free man, any law or usage to the contrary notwithstanding.

Homicide, under the laws of this State, is divided into three classes: I. Murder, which is punishable with death and always attended with malice, express or implied: II. Manslaughter, which is done on a sudden provocation, unaccompanied with malice; for this offence the offender in entitled to his clergy: III. Simple homicide which is either justifiable or excusable, and for which the law of this State has inflicted no kind of punishment: the person charged being deemed unfortunate and not criminal. This is an offence first legislated upon by the act of 1774, and finally by this act of the General Assembly of 1791, which has not affixed either the punishment of murder or manslaughter to it, but that of killing a free man. The killing of a free man under such circumstances as amounts neither to murder or manslaughter, is no crime; no punishment can be inflicted; the person charged is to be acquitted and discharged on his payment of costs. Therefore judgment must be stayed and the prisoner discharged.

Judgment arrested.

Note.—By the act of 1817, (see 1 Rev. Stat., ch. 34, sec. 9,) it is provided that "the offence of killing a slave shall be denominated and considered homicide, and shall partake of the same degree of guilt, when accompanied with the like circumstances the homicide now does at common law."

STATE v. BUTLER.—Page 262.

NOTE.—See S. C. reported in Conf. Rep., 331.

CASES FROM NEWBERN, *December Term*, 1801.

STANLY v. HODGES.—Page 274.

The defendant and one Abraham Bush had a suit depending in the Superior Court of Law for the district of Newbern, in which the present defendant was plaintiff, and which was determined in the Term of March, one thousand seven hundred and ninety-five. The defendant, Hodges, prevailed in the suit; the plaintiff, Stanly, was summoned, and attended as a witness for Hodges, and took out tickets for his attendance, but did not file them with the clerk.—The present plaintiff, Stanly, after the determination of the suit between Hodges and Bush, warranted the present defendant, Hodges, for his attendance, and the cause was removed by *certiorari* to Newbern Superior Court. The plaintiff was proceeding, on the trial, to give evidence to support his cause at common law, as for work and labor done; but was stopped and nonsuited by the court; with leave however to save the following question, for the opinion of this Court, viz.:

Whether prior to the act of Assembly passed in one thousand seven hundred and ninety-six, cap. 12; a witness had a right to charge the party at whose instance he had been summoned and attended, for such attendance at common law, for work and labor done; or must, for his remedy, resort to the party cast in the manner prescribed by the act of Assembly, passed in the year 1783, cap. II.

Hall, J. The 4th sec. of the act of Assembly passed in the year 1783, cap. 11, ascertains the allowance of witnesses attending court, and says that they shall be paid by the party cast; another act, passed in the year 1796, cap. 12, directs that witnesses may prove the amount due them for attendance, and recover the same from the party by whom they were summoned, before the final determination of the suit. However, the English practice, or the practice of this State, prior to the passage of the act of 1783, might have been, I have heard of no instance since the passing of that act, of a witness having sued for the amount due him before the suit was finally determined, and I suppose it was from an impression that no such suit would lie, that the Legislature passed the act of 1796. In a former suit, which the present defendant instituted against Bush, the present plaintiff was summoned by the now defendant, as a witness; the present defendant, then plaintiff, obtained a judgment against the defendant. The plaintiff, a witness in that suit, instead of filing his tickets, the evidence of his debt, in the clerk's office, and having it inserted in the execution, by which means the defendant in the first suit would have been compelled to pay it, (the person who really ought to pay it,) he held it up a considerable time, and then instituted this suit against the present defendant. The latter had it not in his power to recover the costs for which this suit is brought, from the defendant in the first suit, owing to this conduct in the present plaintiff. Suppose the defendant in the first action in the meantime had become insolvent: if a recovery is had in this action, the present defendant must bear the loss, without having been guilty of any neglect. I am of opinion that this action ought not to be sustained.

Taylor, J. The act of 1777, which first ascertains the allowance of witnesses, directs that they shall be paid by the party at whose instance the subpœna shall have issued; and it is for his benefit that the charge shall be inserted in the bill of costs; sec. 33, 45. But a different regulation is introduced by the law of 1783, which provides that the

witness shall be paid by the party cast, and contains a like direction as to the taxation of the ticket in the bill of cost.

Though the latter Act does not require a construction, which shall take away the remedy of the witness, against the party who summoned him; yet, I think, that remedy is postponed, until an execution shall have issued against the party cast.

I have always understood this to be the meaning of the Act, and the law passed in 1796, for the purpose of reviving the witness's remedy against the party who summoned him, would be superfluous upon any other construction. This Act, too, was made expressly to amend and alter that of 1783, and extends only to cases happening in future; whence, it may be inferred, that the Legislature believed they were giving a remedy which did not exist before.

Motion, to set aside the nonsuit,

Overruled.

NOTE.—See S. C. reported in Conf. Rep., 330.

TAGERT v. HILL.—Page 277.

NOTE.—See S. C. reported in Conf. Rep., 164.

SMALLWOOD v. CLARK.—Page 281.

Under the plea of *non est factum*, it cannot be given in evidence that the bond was delivered as an escrow—such evidence is only admissible under a special plea.

This was an action of debt, brought on a promissory note under seal, and assigned to the plaintiff by the original payee; upon the plea of "general issue." The defendant's counsel offered to give in evidence, that the writing obligatory, was delivered as an escrow to a depos-

itary, who delivered it over to the payee before the conditions of the deposit had been performed: but the presiding Judge at Newbern Superior Court, July Term, 1800, thinking such evidence inadmissible, a verdict was taken for the plaintiff, and the case sent up upon a motion for a new trial, to obtain the opinion of this court upon the above question.

It was argued by *Graham* for the plaintiff, and *Woods* for the defendant.

Woods. The question reserved in this case for the consideration of the Court is, whether in an action upon a promissory note, under seal, the defendant may give evidence, upon the general issue, that the writing was delivered as an escrow to a depositary, who delivered it over to the payee before the conditions of the deposit were performed? To prove that this special matter may be given in evidence upon the plea of *non est factum*, the following authorities are so fully in point as to admit of no shadow of doubt; 2 Rolle's Abr., 683. Gilb., treatise on the action of debt (bound with his reports,) 487, Gilb. L. E., 159. 168, Buller's Nisi Prius. Tidd's practice of the king's bench, 203. Nor have I seen a single authority, case, or dictum which, according to my ideas, contradicts, or in the least questions, any of them.

It is indeed said in behalf of the plaintiff, that all refer to and ultimately depend on that in 2 Rolle, of which the author himself entertained a doubt; but surely, it cannot be supposed, that such writers as Gilbert, Buller and Tidd, should cite with approbation, and without any caution to the reader, any authority which was disputable. The manner in which they have stated the law, leaves no room to doubt of their opinion, that it was unquestionable; and the high estimation, in which their works are held, forbids the supposition that they were mistaken. Indeed the rule laid down in Whelpdale's case, 5 Rep., 119, goes much farther, and admits the defendant to give in evidence upon *non est factum*, special matter, which makes a deed void, after it

has once had a legal existence: whereas in our case the writing never became a deed at all.

But it is objected, in behalf of the plaintiff, that all these authorities speak of a special *non est factum*, which is not the general issue but a special plea, and this objection has been so much relied upon, and deemed of such importance in the case, that it becomes necessary to examine it fully; to ascertain what kind of *non est factum* is meant by these authorities, and whether the general issue, which is pleaded in our case, is not by fair intendment that plea.

Rolle says it is *non est factum*, generally pleaded; 2 Abr., 683; Gilb. L. E., 168, uses the very same words, and Buller and Tidd when they refer to the same passage must be supposed to mean the same thing.

Lord Holt in Bushel and Pasmore, 6 Mod., 217, 218, says that "in all his time he never knew such a plea as that, viz., a special *non est factum* in case of escrow and that all these special *non est factums*, in case of escrow, erasure, &c., are impertinent, for thereby the defendant brings all the proof upon himself; whereas if he had pleaded *non est factum* generally, he would have turned the proof of whatever is necessary to make it his deed, upon the plaintiff." This is said, by the plaintiff's counsel, to be an *obiter dictum*, unworthy of regard. It is however the *dictum* of a great judge, and has never been questioned, although the case in which it is found is very frequently quoted. And Gilb. L. E., 163, 164, assigns the reasons, why it was anciently deemed necessary, to plead special *non est factums*, viz., to prevent surprise at the trial, and because they usually contained matter of law, of which, the Court ought to judge, but adds "at this day, the law is otherwise." Again, all the authorities say, the special matter may be *given in evidence*. This necessarily excludes the idea of a special plea which is contended, in behalf of the plaintiff, a special *non est factum* is.

A fact is pleaded, when it is specially alleged in the plea, and offered to the Court. It is given in evidence, when, without being alleged in the plea, it is offered to the jury

as proof of some other allegation, and in legal phrase, no two things are more distinct, than the pleading of matter specially, and the giving of it in evidence. Can it then be conceived, that these writers, when they say that the special matter in question may be given in evidence, mean only, that it may be specially pleaded? This would be absurd. And to maintain that it is necessary at this day to plead a special *non est factum* (that is, in the sense of the objection, a special plea) in case of escrow, is to pronounce Lord Holt both ignorant and rash, and to impute to Gilbert, Buller, and Tidd, a loose, unintelligible jargon. But it is said, in behalf of the plaintiff, that all the precedents to be found in books of entries, and cases of reports on the subject of escrow, are precedents and cases of special *non est factum*. How, it is asked, does it happen, that there is no case nor precedent to be found, of a general one on that subject? To this I answer, that with regard to precedents in books of entries, they must necessarily be of special *non est factum*; for a general one, in case of escrow, is not distinguishable from a general one, in any other case. There are no precedents of *non est factum* peculiar to the cases of erasure, interlineation, and false reading of a deed; and yet, these are cases which must have frequently happened. The reason must be, that such special matters have been given in evidence, upon a general one. The same observation applies with force, in regard to reported cases; the questions in those cases, have been such, as could arise only, in special *non est factums*. In general cases, none could arise, except with respect to evidence; and upon a point so simple and unfrequent, as whether a deed was delivered as an escrow, or not, it is not remarkable that few cases should occur, worthy of the notice of a reporter. As few will probably be found, of interlineation or false reading of a deed, and yet it will not, I presume, be thence inferred, that such matters may not be given in evidence on a general *non est factum*.

But admitting, for the sake of argument, that all the foregoing authorities, contrary to the express words of some of

them, speak of a special *non est factum*, I must still be permitted to contend that such plea may be considered the general issue, which we have pleaded.

All the authorities say, that a special *non est factum* in case of escrow, may conclude to the country, and some of them say, it must. In Watts and Rosewell, 1 Salk., 274, such was held ill, because it did not conclude to the country. The cases in T. Raym., 179, and 6 Mod., 217, both conclude in that way. And Gilbert L. E., 164, says the general way is to conclude the country, but it is appre hended *not to be vicious* to conclude with a verification. It is presumed to be a general rule in pleading, deducible from reason and authorities, that a plea which concludes to the country is a general issue. A plea which denies the whole declaration, is called a general issue, because it amounts at once to an issue; 3 Bl. Com., 305. Where the whole contents of a plea, are denied, the conclusion must be to the contrary; but a particular fact only, it must be to the Court. 1 Bur., 319; Doug., 429, *non est factum* is a plea which denies the whole declaration and is therefore a general issue, 3 Bl. Com., 305. If it be a special one, it concludes with the same denial and for that reason ought to conclude to the country; see the reason urged in Watts and Rosewell, 1 Salk., 274: with such conclusions it amounts to an issue. It is, then, a general issue. If therefore, a special *non est factum* may be considered a general issue, as well as a special plea, it would be contrary to reason and the spirit of modern practice, to consider it a special plea for the purpose of excluding evidence. General pleading is at this day much favored; 3 Bl. Com., 305, 6: and that strictness which was formally required or indulged under pretense of preventing surprise is justly considered discreditable to the Profession.

Graham. The books relied on as authorities for the defendant are 2 Rolle, 683; Gilb. L. E., 159, 168. Gilb. Rep., 437; 6 Mod., 218; Bull., 172; Tidd's pract., 203. The passage found in Rolle, is there given on the authority of one of the Year Books, 9 *H.*, 6, 38, and it must be

admitted would be of great weight towards deciding the question, were not the expression of doubt that accompanies it, not less strong than the passage; and could it not be shewn, that the law is not so, by more modern authorities, and an uniform practice to the contrary. Whether the *quare* annexed to this passage, be found in the Year Book, or be the suggestion of Rolle, cannot be a material circumstance; in either case it shews that the law was not then settled, at least; and if Rolle adds the *quare*, it will follow, that his opinion, and the practice of his day, were at variance with the Year Book. Gilbert's law of evidence, and his treatise on debt, in the pages referred to, also give support to the opinion, that escrow may be given in evidence on a general *non est factum*. But we are referred to the single case in Rolle, just examined, for the authority on which his lordship had formed this opinion: the naked *dictum* of his lordship would have been more respectable; resting on the authority in Rolle, which concludes nothing, it certainly derives no additional force, from its transposition into Baron Gilbert's treatise.

But it is said, the defendant has on his side also, the opinion of Judge Holt, a great and respectable name among the profession of the law; and for this we are referred to 6 Mod., 218, and it is true, that this great lawyer does contrive, or is made, rather out of place, it will be allowed, to say, *obiter*, that these special *non est factums*, in cases of rasure and escrow, &c. are "impertinent." But when it is considered, that the case before the Judge was a case of an escrow, the plea a special *non est factum*, and no question whether escrow might not be given in evidence on a general *non est factum*, made or argued; this expression, far from deciding the point, will only excite our surprise, at his irrelevancy to the business in hand, or at most, is only to be considered a mere *obiter dictum*.

It is always understood that these accidental expressions of even the most learned and experienced judges on points of this nature, not under the consideration of the court, and without any previous investigation, are not to be regarded

as authorities, as well, in justice to the judges, as from the danger of admitting them. The judge himself attaches no consequence to them, and on a slight examination often changes his opinion; the reporter too, having his attention occupied, by the principal question, is very liable to error on collateral points. It is worthy of remark that, wherever this opinion, as ascribed to Judge Holt, is noticed by subsequent writers, it excites surprise, and its correctness is questioned. 4 Bac. Abr., pleas and pleadings, 62. Perhaps, if this had been the point submitted, his lordship would have made up a different opinion. Neither Buller nor Tidd make any distinction between a general and a special *non est factum*. They, as well as many others, seem to consider both as one plea, in contradistinction to all special pleas in bar, in the actions of debt: thus, they say rasure, coverture, escrow, &c., may be given in evidence on the general issue, *non est factum;* but *per duress*, *per minas*, release, &c., must be specially pleaded. When, under the first branch, you examine the cases referrred to, as Sir T. Raym., 197, and 6 Mod., 218, they are cases of escrow, and the pleas are special *non est factum;* so that the only meaning they can be supposed to have, is, that you need not plead escrow, as specially as you must *per duress*, &c., but you may take advantage of it on a *non est factum*, that a special *non est factum*, which concludes to the country, and not with a *paratus est verificare*, as do these special pleas. It may, therefore, fairly be presumed that Baron Gilbert has mistaken the true import of earlier writers, and given to them a latitude of construction, beyond what they intended. It is concluded therefore by the plaintiff, that there is no good foundation to say, that under a general *non est factum*, delivered as an escrow may be given in evidence.

In order to prove, that a special *non est factum* must be pleaded, it is remarked, in the first place, that to allege the special matter relied on is most consonant to the principle of pleading, which is everywhere avowed, that the Court and adverse party should be fairly apprised of the nature and circumstances of the defense; which can be done only by

setting forth the particular facts; thus, surprise is avoided, and the parties come prepared to try the true question. If this principle has force in regulating the pleading, in the British courts, it becomes much stronger in its application to the mode of pleading, in our own courts. With us, the name or names only, of the pleas are entered on the docket: whereby the hazard of being entangled in special, or general demurrers from the nicety required in pleas drawn at full length, is avoided; which was the only evil intended to be remedied by the relaxation of the rule which required all special matter to be specially pleaded.

It is contended secondly on the ground of express authority, that the escrow must be pleaded by a special *non est factum;* and the cases that are deemed such authorities are Com .Dig, pleader, (2 W., 18,) 643, throughout. *Non est factum* is a good plea, when the bond or specialty was not executed, but if it was, but was void *ab initio* for other cause, such as escrow, among others, a special *non est factum* may be pleaded: so is Morg. vad. mec., 221, 222, Espinassee, debt, 149, and the authorities there referred to, Co. Litt., 56, *a*, 1 Vent., 9; 2 Vent., 10; 1 Salk., 274; 6 Mod., 218; Sir T. Raym., 197; Morg. Ess., 299; 4 Bac. pleader, 62; Lill. Ent., 187, 184, and other modern entries generally. From an examination of these cases and entries, this fact will appear, that escrow, has, without exception, in earlier, as well as later times, been pleaded under a special *non est factum;* and this conviction will result; that it has been the opinion of the ablest judges, pleaders and practitioners, that it is the only safe and proper plea.

It is conceived, thirdly, that this conclusion may also be established by reasoning from the practice, to the law; the pleadings in cases are said to be pretty certain indexes to the law. If it be found that in all cases of escrow, whether of ancient or modern date, the plea is a special *non est factum*, especially, if no one can be shewn, where it was offered in evidence on a general *non est factum*, the conclusion is logical, natural, and strong, that a special *non est factum* is the plea required by law. All the reporters abound in

cases of escrow all under the plea of special *non est factum;* a solitary case of escrow, when a general *non est factum* was pleaded, the plaintiff's counsel, after a laborious search, has not been able to find, nor has the defendant's counsel pretended to produce one. If it were thought consistent with the law, would not counsel rather surprise his adversary with a special defense, under the general issue, than to furnish a plea which states explicitly the circumstances on which he rests his defense; which requires more labor and more skill, to place it beyond exception; and which assumes upon itself, *the onus probandi?* The special *non est factum*, adapted to the case of an escrow, being carefully inserted in the entry books of pleading, another circumstance, from which to infer, it is considered to be a necessary plea.

Hall, J. I think it would be improper under the circumstance of this cause for the defendant to give evidence of the fact which he has suggested under the general plea which he has pleaded.

Taylor, J. It is the common, and I believe the universally received opinion of the profession, that where the general issue is pleaded to a sealed instrument without a subscribing witness, proof of the obligor's handwriting is sufficient to maintain the action. A witness who was present at the delivery, and is able to shew that it was absolute and unconditional, is not required in such a case; for, from the signature being proved, the jury will presume a sealing and lawful delivery. It would, therefore, produce much inconvenience, if by allowing the defendant to give delivery as an escrow in evidence, the plaintiff's action were defeated, when, perhaps, had he been apprised of the defense, he might have adduced evidence to prove a performance of the conditions. But the application of such a doctrine to the case of an assignee, would be replete with injustice, and would impose upon him such trouble and difficulty, as might materially contribute to impede the circulation of these instruments. The obligee being privy to the original contract, may be supposed to understand the terms upon which it was made, and to be ready to vin-

dicate his right to a recovery, whenever the particular objection shall be made known to him. To him, the depositary of the writing is known; the precise terms upon which the first delivery was made, he must also be acquainted with, and how far they have been executed on his part. But the assignee, taking the bond upon the credit of the obligor and obligee, and of the various indorsers whose names it may bear, is probably ignorant of the circumstances of the contract; and least of all, will he think it necessary to provide other proof to resist the general issue, than that of the handwriting of the obligor, and that of the first indorser. It does, therefore, appear to me reasonable as well as just, that the plaintiff should have notice of this defense by an entry on the docket, so that he might have enquired into the truth of it, and prepared himself either to resist or yield, as the truth should warrant. And the remark of the plaintiff's counsel has great weight with me, that the simplicity of our mode of practice, which requires only an entry upon the docket, of the defense relied upon, while it preserves what is valuable in special pleading, does effectually guard against the evils for which it has been justly reprobated. If therefore the rule of law should appear, upon an examination of the books, to be, that upon the general issue of *non est factum*, delivered as an escrow may be given in evidence, it should be observed, that the application of the rule to the case of an assignee could never have been contemplated, since sealed instruments were not made negotiable in this State until 1786; and whatever may be the reason and justice of the rule as between the parties, it seems plain that when a bond goes into a course of circulation, the reason ceases. It is very certain that the authorities upon this subject do not all concur, and it is difficult amidst the conflicting opinions of learned men, to pronounce with certainty, how the law is at present understood. But if an investigation of judicial decisions produces doubt instead of conviction, it is allowable to take into view considerations from inconvenience, and under that impression, I have made these preliminary remarks.

There are several cases of an early date which seem to shew that a special *non est factum* was the customary defense in all cases of escrow; and even the reported cases of a later period serve to create doubt rather respecting the proper conclusion of a such a plea, than as to the propriety of the plea itself. The following cases are stated in Vin. Abr., Tit. Fait., 18 Ed. 3, 3, 29. Debt upon an obligation: the defendant said that he delivered it to J. S. as an escrow, upon certain conditions, to be performed, to deliver the plaintiff as his deed; and said the conditions were not performed and so not his deed: this is no plea, because he does not confess any delivery to the plaintiff, by which he shall say that the said J. S. delivered the obligation to the plaintiff and so *non est factum*, and well, because otherwise nothing shall be entered but *non est factum* generally. The plea was held to be defective in this case, because it omitted to state a delivery of the deed from J. S. to the plaintiff. Had this fact been stated, it is admitted that the special *non est factum* would have been good.

9 Hen. 6, 37. If a man seals a deed and delivers it to a third person to keep till a certain condition be performed, and then to deliver it to the obligee, and an action is brought, the defendant may plead this matter, and conclude so not his deed, because it never was delivered as a deed.

19 Hen. 6, 38, and 10 Hen. 6, 25, 26. If a man deliver an obligation to J. S. upon certain conditions, to be performed, to deliver to the obligee as a deed, and if not to keep as an *escrow*. If the obligee get it contrary to the condition and brings debt, the other cannot shew this matter and conclude so *non est factum*, for it was an escrow and never a deed.

The last case furnishes an example where escrow pleaded with a verification as a special plea, was excepted to and overruled, on that ground; it being held that such a plea should conclude with tendering an issue. The same point arises in *Watts* v. *Rosewell*, 1 Salk., 274, where judgment was rendered against a special *non est factum*, because it did not follow the precedents of such pleas in concluding

to the country: and although in the case of *Bushel* v. *Pasmore*, cited from 6 Mod., the special *non est factum* did conclude to the country, notwithstanding which, pleas of that kind were disapproved of by Lord Holt, yet the reason he gives is not quite satisfactory at present, however forcible it might have been at that time. That case was decided in 3 Anne, before the passing of the Act for amendment of the law which permitted defendants with leave of the court to enter several pleas. When a defendant was confined to one peremptory plea, it was a material advantage to him that it should be of that kind, which would place the burthen of proof upon the plaintiff.

But now that several pleas may be entered, one which shall compel the plaintiff to prove his case, and another which shall apprise him of the objections intended to be made against his recovery, justice is more likely to be attained by a reliance on both than by the omission of either. Consider the case even before the statute of Anne; it strikes me that a general *non est factum* would afford but a very limited and partial security to defendants, whose deeds were delivered as escrows. If there were a subscribing witness and he alive at the time of trial, then indeed the plaintiff being bound to prove by him an actual delivery, so as to make the defendant's deed, must submit to the consequence of such evidence as the witness shall give, and in the case of a real escrow would be prevented from recovering. There, it may be said that a general *non est factum* is most beneficial to the defendant, and that as he had the liberty of entering but one plea, it would have been wrong to have selected that which should have placed the burthen of proof upon himself, when by pleading another he might have placed it on the plaintiff. But if the deed had no subscribing witness, or the witness were dead, would a defendant choose to trust his case upon a general *non est factum?* The plaintiff, would recover from the presumption of delivery arising from the proof of handwriting and the possession of the instrument, unless the defendant should adduce proof that it was delivered as an escrow; and if the

same necessity of bringing forward evidence to prove his case, existed, whether he pleaded a general or special *non est factum*, then, as to him, it is not impertinent to plead the special one, which in the view of justice ought to be preferred, because it informs the plaintiff what the point is, which is meant to be disputed. Rasure may be given in evidence on a general *non est factum*, and as that is a fact which appears on the face of the bond, rendering it absolutely void, there is no occasion to give the plaintiff other notice, because he could not by any proof restore its validity. But in the case of escrow, the deed must be sealed and delivered by the defendant, conditionally it is true, but whether the condition be of such a nature as to form an escrow in point of law, may be a question of sufficient importance in some cases to be submitted to the Court in the first instance, and as the allegation arises, from circumstances which cannot be collected from a view of the instrument itself, and which may or may not render it void eventually, accordingly as they are valid in point of law, or true in the point of fact, there seems to be sufficient reason why the defense should be shaped as a special *non est factum*. Reasoning of this kind was anciently thought so just and forcible as to confirm the propriety of making all objections to a deed, which arose from matter *dehors*, by means of a special *non est factum*, whether of coverture, or because the party had no right to the thing transferred, or of rasure, interlineation or addition; all these defenses must have been specially pleaded, that the plaintiff might come prepared to falsify the evidence.

The special conclusion with an *issint non est factum* was referred to the court for another reason, viz., that they might decide in the first instance, what they might afterwards be called upon to decide upon a demurrer to evidence or a special verdict. But at this day, says Baron Gilbert, the law is otherwise, and if a man pleads "delivered as an escrow and concludes specially *issint non est factum*, the general way is to put it to the jury, because it is in effect to say there was no deed at all, but they may

put it to the court by an *hoc paratus est verificare*, because the court will judge whether he exhibited such matter as will make the deed of no effect at all, &c." From this extract it appears to have been the opinion of the writer that a special *non est factum* is proper in the case of an escrow; but that the better way of concluding such a plea is to the country. The opinion of Morgan cited by the plaintiff's counsel, as to the propriety of such a plea, though he differs as to the conclusion, is I think of great weight inasmuch as he is a special pleader of eminence, and conversant in the modern practice of the courts. To this may be also added the case of *Collins* v. *Blantern*, 2 Wils., 347, where the general principle is recognized that if a bond be void in law, the facts which make it so may be averred and specially pleaded, and that the proper conclusion of such plea is with a verification.

Taking into view all the foregoing considerations, I thing the present case is one, where the Court may and ought to require some notice of the defense relied upon, to be given to the plaintiff.

Judgment for the plaintiff.

NOTE.—See acc. *Anonymous*, 2 Hay. Rep., 327, but see *contra*, *Moore* v. *Parker*, 1 Murph. Rep., 37. S. C. Conf. Rep., 553.

A. MILLER'S EX'TRX v. GORDON'S EX'R.—Page 300.

To a plea of the statute of limitations of 1715, to debt on a bond by a British subject, replication of the treaty of peace of 1783, is bad.

Debt on a bond executed by the defendant's testatrix to the plaintiff's testator in 1775, plea, the Act of Assembly passed 1715, which bars the creditors of deceased persons who do not make their claim within seven years after the death of the debtor. Replication, the treaty of peace

of 1783. A verdict was found for the plaintiff in Newbern Superior Court ascertaining the amount of the debt. The cause was sent here to be decided upon the above pleadings.

HALL, J. It is not now to be decided, whether the plea of the defendant, in case this suit had been brought by an American citizen, would be a good one: that has already been determined in the affirmative. The plaintiff rests his case on the ground that he is a British subject; had the Act of Assembly, which is pleaded by the defendant, for its object British creditors only, and were it one of those impediments contemplated by the fourth article of the treaty of peace, the question perhaps would assume a different aspect. But it is a general law, not made for one person or set of men, more than another, and I cannot see any reason why it ought to lose any of its force or operation, when pleaded against a British creditor sooner than if it had been pleaded against another person. Suits were brought by British creditors since the revolution on open accounts, &c., to which the act of limitation was pleaded, and this plea by our courts was held to be a good one. If a plaintiff thinks proper to lie still and thereby suffer his claim to be barred, the neglect is his own and he must abide the consequences. I think the plea pleaded by the defendant in the present case, should be sustained.

Judgment for the defendant.

NEWBERN DISTRICT, *July Term*, 1802.

JOHN LOUIS TAYLOR, Judge.

SMITH v. MURPHY.—Page 303.

NOTE.—See S. C. reported in 2 Hay. Rep., 183.

JOHNSTON v. MARGARET HUNLY.—Page 305.

Land purchased after the making of a will, does not pass by any devise in it.

Ejectment, for a house and lot in the town of Newbern. The plaintiff claimed as heir-at-law to Richard Hunly, who had devised the residue of his property to his widow, the defendant, after having made sundry specific bequests. The deed for the lot in question was made to the testator after the executing of his will; though evidence was offered by the defendant to shew that the purchase was made before.

Graham, for the defendant. From the time of the contract between the vendor and the testator, the former should be considered as a trustee for the latter, who was in truth the owner of the lot, and had a right to dispose of it as he thought fit. That an equitable estate in lands will pass by devise has long been settled by various adjudications; 1 Ch. Ca., 39; 1 Ves., 437; 2 Vern., 679. And if the disposition to the widow in the present case would be sustained by a court of Chancery, it will prevent circuity of action to allow her to set up her title in this ejectment. Nor is such a defense a novelty in a court of law; for in *Edward* v. *Baily*, Cowp., 597, the defendant prevailed on the ground of an equitable title alone, though the legal estate was in the plaintiff.

Woods, for the plaintiff. That a devise of lands is considered in the nature of a conveyance by appointment, and that a man cannot devise lands which he has not, when he makes such conveyance, are positions too clear to require authority or illustration. In this respect, there is no difference between the law of England and of this State; for we have no Act of Assembly which allows the disposition by will, of lands which the testator may have at the time of his death. Whatever right may be acquired by the devisee in the present instance, it is plainly not such a one as can be opposed to the legal estate which the law has cast upon

the heir; and his claim is also strengthened by certain equitable considerations, which it were useless and even irregular to insist upon in this place.

By the Court. The plaintiff having the legal title, is consequently entitled to a recovery in this action. The case cited from Cowper went upon the ground of the plaintiff's attempting to defeat a solemn deed under his hand, whereby he covenanted to let the defendant enjoy the premises: but that is very different from the case of an heir who has done nothing to impair his title.

Verdict for the plaintiff.

NOTE.—See acc. *Jiggitts* v. *Maney*, 1 Murph. Rep., 258, which also decides that if there is a new publication of the will after the purchase, the land may pass.

HENDERSON v. SCURLOCK.—Page 307.

Where the defendant's attorney informed the plaintiff's attorney at one term, that he should file a plea in abatement, and then failed to do so, the plaintiff at the succeeding term, was allowed to enter judgment as of last term, and execute his writ of inquiry *instanter*.

The writ was returned executed to the last term, and an appearance entered by the defendant's attorney, who informed the plaintiff's attorney, upon entering up the rules, that he should file a plea in abatement. The plaintiff's attorney, upon learning the substance of the plea, said he should take issue upon it: but no plea was entered, and, upon motion to enter judgment by default as of the last term and to execute the inquiry *instanter*:

By the Court. It is stated by the attorney for the plaintiff that he should have exercised his right of taking judgment by default at the last term, but for the expectation

that the plea in abatement would have been filed; on which he admits, that he had intended to take issue. Had this been done, the plaintiff would now be entitled to a trial of the issue, and, in the event of its being found for him, to a peremptory judgment. He ought not therefore to be delayed a term by the omission to plead in abatement.

Motion allowed.

MILLER v. IRELAND.—Page 308.

The master of a vessel cannot give his protest in evidence.

If a bill of lading be not stamped, parol evidence may be given of the contract to carry the goods.

It was ruled in this case, I. that the defendant, a captain of a vessel, could not give in evidence his own protest for the purpose of shewing that he was compelled by stress of weather to throw overboard the goods, for the non-delivery of which the action was brought.

II. That the plaintiff might declare on a special agreement to deliver goods, though a bill of lading was signed; which, being without a stamp, could not be given in evidence.

Harris and *Stanly*, for the plaintiff.

Graham and *F. X. Martin*, for the defendant.

NOTE.—See acc. on the first point, *Cunningham* v. *Butler*, 2 Hay. Rep., 392.

MILLER v. WHITE.—Page 309.

A sale of land by two of four executors appointed by the will is good if the others refused the executorship.

If justice be done, the court will not grant a new trial on the ground of misdirection.

A line of a deed or grant calling for the line of another grant, shall be extended to it if it be in the course, though beyond the distance.

This cause was tried at the last term and a verdict found for the plaintiff under the direction of the Court. A rule was obtained by the defendant's counsel, calling upon the plaintiff to shew cause why a new trial should not be granted, on the ground that improper evidence was suffered to go to the jury, and on that of misdirection.

After argument by *Haywood* and *Baker* for the plaintiff, and *Harris* for the defendant, the following opinion was delivered:

By the Court. This verdict is complained of I. because the deed under which the plaintiff claims, was permitted to be given to the jury as evidence of his title, although it was executed by two only of the executors, whereas four were appointed by the will of Bryan, and no evidence was adduced of the renunciation of the other two. II. It is said that the charge of the Judge was incorrect, in instructing the jury, that the first line of Bryan's patent should be continued to Walter Lane's, instead of submitting it to them upon the evidence whether the line ought not to stop at the distance.

With respect to the first reason, I shall consider how far such evidence was improper, and whether it is sufficient cause to grant a new trial.

The general principle is, that a naked authority to executors to sell, being derived from the will alone, must be strictly pursued. The special confidence placed in them must be executed by the persons named, and by all of them;

and whether they accept the administration or not, they have equal power to make a valid sale. Although it is admitted that nothing more than a naked power was created in the present case, yet a distinction has been made, where the persons directed to sell are named specially, and when they are referred to as executors, or by a general description; and the cases cited establish this distinction so far, as to authorize a sale by the survivors, where executors or sons-in-law have power to sell, some of whom die before the sale takes place. But it is doubtful whether the reason of these cases will authorize a sale by two of four executors when all are alive, and competent to join in the deed, when the sale takes place. The cases are thus noticed in Co. Litt., 112 *b*, 113 *a*. If a man devise lands to A for term of life, and after his decease his land should be sold by his executors, and he maketh three or four executors, and during the life of A, one of the executors dieth, and then he dieth, the other two or three executors may sell, because the land could not be sold before, and the plural number of his executors remains. The impossibility of selling the land during the life of A, seems to be the reason why the other construction was resorted to, in order to give a liberal interpretation to the will. So in the case of *Lee* v. *Vincent*, cited from Cro. Eliz., one of the sons-in-law died in the lifetime of the donee, and therefore the land could not be sold by all. In both these cases the objects of the devise must have been frustrated, had not the sale by the survivors been adjudged valid: in the case before the Court; such a consequence cannot follow, because the power of all the executors remains in full force.

If the authorities had stopped there, I should have hesitated to decide that the sale in the present case could be made by the two executors without the aid of the statute of Hen. 8. But case of *Bonifaut* v. *Greenfield*, Cro. Eliz., 80, advances a step further, and, if it be law, goes the whole length of deciding the present case. It is a devise of land in fee to several executors to the intent that they should dispose of it, and it was adjudged that the sale made by three in the lifetime of the fourth, he refusing to execute the

authority, was valid. Upon the authority of this case, therefore, the deed in question might properly have been relied upon to support the plaintiff's title, if a refusal of the others, either to prove the will or join in the sale, had been proved. For I do not conceive that a renunciation of record is required either by the reason of the thing, or the practice and usage of this State. If there was any evidence of the fact before the jury they were the proper judges of its weight; if there was none, then I apprehend it was improper to submit the deed to them as legal evidence of title; but,

II. Is this a sufficient reason to direct a new trial? A motion for a new trial is an application to the discretion of the Court, which they must endeavor to exercise in such a manner, as will most effectually attain the justice of the case. If the merits have been fairly tried and the very right of the cause determined, a new trial ought not to be granted for the purpose of letting the losing party into an objection of a strict legal nature. And is laid down in *Edmondson* v. *Michael*, 2 Term Rep., 4, that if the Court see that justice has been done between the parties, they will grant a new trial, on the ground of a misdirection in point of law. The plaintiff is a purchaser for a valuable consideration from the executors, who sold in execution of the purpose of the will. The two persons who did not join in the sale, have denied that they intermeddled with the estate. Such evidence upon another trial would be a ground for the jury to infer a refusal, and another verdict must place the parties, as to this objection, precisely in the condition they now are. This, however, cannot be a sufficient ground to set aside the verdict.

III. In giving my opinion upon this part of the case, I feel some difficulty arising from the imperfect knowledge I have of the testimony given at the former trial, and which I have been obliged to collect as well as I could from the observations of the counsel. Upon the abstract question of law, and deciding alone upon what appears in the grant under which the plaintiff claims, I should decide in his favour. The description of the land patented is, beginning

at a pine and runs south 80 *East* forty poles to a stake in the line of Walter Lane's patent, then along the line, north 10 East, twenty poles to his corner, then East 180 poles, to White's line, then with his line, &c.

Upon the face of the patent there is neither ambiguity nor repugnancy, but its primary intention manifestly was, that Walter Lane's line should be the boundary; that it should be the termination of the first line, and the course of the second; and when it is seen, that Walter Lane's patent is issued in 1746, it is a reasonable conjecture, that the line was well established. But upon an actual survey it appears that although Walter Lane's line is in the course called for by Bryan's first line, yet that the distance of the latter gives out forty poles short of Lane's line. If the second line be drawn from the point, where the distance of the first ends, it will never reach Lane's corner: and if the third line be drawn from the point where the second ends, it will proceed one hundred and eighty poles into the body of Lane's land, and of course never reach White's line, which is the third corner the patent calls for. Such are the consequences which follow from confining Bryan's first line to the forty poles called for in the patent; whereas, if it is extended forty poles further, to Lane's line, and thence to his corner, there was, when the grant issued, vacant land enough to satisfy it. It appears to me, that a line called for, if it be in the course, and can be shewn to be the line of an old patent, designates, more effectually than the plotted distance, the land which was intended to be secured. If it were intended to be bound, by the distance, why refer to the line of another tract? Why not mark a tree at the end of the distance if it is really surveyed, or specify the distance only if it is plotted. In every case, where the line of another tract is called for, and no actual survey has taken place, I should apprehend that it was done, either because the surveyor believed that the distance would reach it; or if he should be mistaken in fact, then, that the line and not the distance should ascertain the land which he certifies. I say this in reference to lines well ascertained, and

in the course called for; and whenever the distance falls short, I think the presumption very strong that the mistake has happened there. But if in any case of this kind it can be shewn, that the land was actually surveyed and located according to the distance, and such evidence is corroborated by marked lines and corners, it will, then, follow that the superfluous descriptions are false, and the patentee can consequently derive no benefit from them. I do not perceive that the case of *Bradford* v. *Hill* is in opposition to this opinion. There Bryan's corner was four degrees to the East of North, of the course called for in the deed to Bustin; notwithstanding which, I suppose it was submitted to the jury to decide whether the old marked line from Pollock's to Bryan's corner was not the true one, since the case states that this line was taken by the jury to have been run by some person after the survey. It is true, the court say that in all cases where there are no natural boundaries called for, the dispute must be decided by course and distance, or by proving the line and corner. In that I concur, with this qualification, that the distance is not conclusive proof of the line and corner, where an old line is called for, which is not variant from the course. Further than this, the present case does not call for an opinion, though the cases of Branch and Ward, of Eaton and Person and of Person and Roundtree, have gone much further in deviating from the words of the patent; for they all tend to establish this position, that the mistake of the surveyor or of the secretary who filled up the grant, shall not prejudice the patentee.

Rule discharged.

NOTE.—Upon the first point, see acc. *Marr* v. *Peay*. 2 Murph. Rep., 84. *Debow* v. *Hodge*, 1 Car. Law Repos., 368. *Wood* v. *Sparks*, 1 Dev. & Bat. Rep., 389. *Wasson* v. *King*, 2 Dev. & Bat. Rep., 262.

Upon the second point, see *Allen* v. *Jordan*, 2 Hay. Rep., 132, and the cases referred to in the note on the second point in that case.

On the last point, see *Smith* v. *Murphey*, 2 Hay. Rep., 183, and the cases referred to in the note.

PENDER v. COOR.—Page 315.

When the lines called for in a grant were "East 177 poles to an oak, thence southwardly, the various courses of the river; and there was a marked oak at the end of the distance; and the river from the point where a direct line from the oak would intersect it, ran southwardly: but if the east line went directly to the river, the river from this point of intersection would run westwardly until opposite the oak: *it was held* that the jury ought to find the line to the oak, and thence southwardly to the river, if they believed that to be the real line run when the original survey was made.

Ejectment. The land claimed by the plaintiff, was granted in the year 1745, and became the property of Walden in 1764, who after owning it for thirty years, conveyed to the plaintiff. The courses and distances, expressed in the patent, were as follow; beginning on the river, running then West 179 poles, then North 179 to a pine on the road, then East 179 poles to an oak, then Southwardly the various courses of the river to the beginning. The pine at the end of the second line was proved, and in running the third line two fore and aft trees were found, whose marks denoted age; at the end of the distance and about six poles Northwardly of the latter line was also found a black oak tree, marked as a corner, though in appearance, the marks were not so old either as those on the pine, or on the line trees. This oak, however, was called by Walden his corner tree, and before the sale to Pender, he said he could not sell further than the oak. If the third line stops at the termination of the distance a line drawn thence South reaches the river at the distance of about 25 poles and leaves out the land claimed by the plaintiff. Whereas if the third line is continued for 115 poles beyond the distance called for, it reaches the river and includes the land for which the suit is brought.

It was argued for the plaintiff, that the river in the course of the third line must be the boundary: had it been expressly called for, as the termination of the line, it could not be more completely designated than it is, by the fourth and last

line being directed along its various courses to the beginning. The distance, therefore, must be disregarded, according to the cases of *Sandifer* v. *Forbes* and *Hartsfield* v. *Westbrook*. Haywood Rep.

For the defendant, it was insisted, that the cases cited could not govern this, which had features peculiar to itself, and in no wise resembling those relied upon. Here the word Southwardly in the grant, imports a direction to the river from the point where the distance of the third line gives out, and may well be taken as descriptive of the very short line which reaches the river: this seems evident, when it is considered that 179 poles form the length of each of the principal lines; and that the corner tree at the end of the disputed line, or one very near it, is well established.

By the Court. To decide this question upon the words of the patent alone, the inclination of my mind would be in favour of the plaintiff's construction. But, upon examining the situation of the land as described in the plot, and upon hearing the evidence with respect to the marked corner, a very strong presumption arises that the word "Southwardly" was inserted in the patent, for a purpose more significant than that, of describing the various courses of the river to the beginning. The case, therefore, resolves itself into a question of evidence, whether the lines and corners are established with such certainty as to create a belief, that the third line was intended to stop at the end of the distance, and thence to pursue a Southwardly course in order to arrive at the river. For if that was the land originally patented, there should be a verdict for the defendant.

Verdict for the defendant.

Haywood and *Stanly*, for the plaintiff.
Harris, for the defendant.

NOTE.—See *Sasser* v. *Alford*, 2 Hay. Rep., 148. *Person* v. *Roundtree*, 1 Martin's Rep., 18, and the cases referred to in the note thereto.

SALTER v. SPIER.—Page 318.

On the trial of an issue in Equity, the defendant's answer cannot be read in evidence for him.

Upon an issue in Equity, submitted to the jury to ascertain whether satisfaction had been received by the complainant, for the property claimed in the bill: it was ruled by the Court, that the defendant's answer, affirming the fact, ought not to be read to the jury as evidence of it, for the answer being replied to and put in issue, the defendant is bound to prove the facts he relies upon as a defense.*

NOTE.—See *Scott* v. *McDonald*, 2 Hay. Rep., 98, and the cases referred to in the note; by which it appears that the answer is evidence for the defendant where it is directly responsive to the allegations of the bill, but not otherwise.

*It is a rule in Equity that if the facts upon which the complainant grounds his equity, be positively denied by the answer, the court will not decree in the complainant's favour on the testimony of a single witness. But when the court doubt concerning the fact, they order a trial at law, with direction that the answer shall be read to the jury, who are to decide what credit it is entitled to. A jury, in this State, forms a constituent part of a Court of Equity, in the determination of issues of fact; and as the act of 1782, cap. 11, declares "that the same rules and methods are to be observed in this case, as have been practiced upon questions of fact being submitted by a Court of Chancery to the decision of a common law jurisdiction; it merits consideration whether they ought not in every case to decide upon the credit due to the answer. Vide 2 Vez., 42. 2 Atkyns, 19; 1 Eq. Cas. Abr., 229, pl. 13.

HUNT v. WILLIAMS and MILLER.—Page 318.

An answer taken abroad under a commission, may be read, though the commission was taken out in blank and filled up by the defendant with the names of two persons, who did not appear either by the commission or certificate, to be authorized to administer oaths where the answer was taken.

The complainant's solicitor objected to the reading of the answer on this ground:—a blank commission had been taken out, and filled up by the defendant with the names of two persons, who did not appear either by the commission or certificate, to be authorized to administer oaths in Georgia, where they reside. He said that although the Court might direct a commission to any person, yet when the party is intrusted with a blank commission, he ought not to be allowed so much latitude; that he understood that in the case of *Blount* v *Simpson*, the Federal Court of this district had set an answer aside on the same ground; saying a party should direct his commission to a person authorized to administer oaths, by the laws of the country in which he resides. For, if any one could be resorted to indiscriminately, it would be easy to find some person mean enough to certify that an answer was sworn to, although no oath was ever taken.

By the Court. Surely that is a great inconvenience; but the same mischief might occur, if the rule was as stated; for such mean persons, who could be willing to certify that the answer was sworn to, without an oath being taken, would not scruple to add the letters J. P. or any title of office to their names.

Answer read.

F. X. Martin, for the complainant.
Gaston, for the defendant.

NOTE.—See *Irving* v. *Irving*, 2 Hay. Rep., 1.

DAWSON v. SPEIGHT.—Page 320.

If a commission to take an answer be filled up by the master, the party cannot strike out the name of the commissioner to insert another, though he might have done so had the commission been taken out in blank.

The complainant's solicitor objected to the answer being read, on the ground that it was not sworn before John Bolton, the person to whom the Clerk and Master had directed the commission, but before William Devereux, whose name had been inserted instead of that of John Bolton, which had been struck out.

By the Court. If a commission be taken out in blank, the party may fill it up, and afterwards, if occasion requires it, strike out the commissioner's name; but if the Clerk fills up the commission, his act is that of the Court, and the party may not strike out the name of the commissioner and insert another.

Answer set aside.

F. X. Martin, for the complainant.
Stanly, for the defendant.

*** The "Observations on the act of 1715, ch. 27, with a view to ascertain its proper construction," are to be found in 1 Murph. Rep., 22, in note b, to the case of *Stanley* v. *Turner*, and are therefore omitted here.

CASES

RULED AND DETERMINED

BY THE

JUDGES

OF THE

COURT OF CONFERENCE.

JUNE TERM, *A. D.* 1800.

JAMES HOGG, Surviving Ex'r v. SAMUEL ASHE.—Page 3.

When a chose of action is assigned for value received, no debt contracted, or liability incurred, subsequently shall be allowed even at law as a set-off against the assignee, especially if there be an act of the Legislature taking notice of the assignment and enabling the assignee to sue in his own name.

This was an action of debt brought in the Superior Court of Law, for the district of Hillsborough, on a writing obligatory executed by the defendant on the 9th day of December, 1778, to Robert Hogg and Samuel Campbell, merchants and copartners; by which he bound himself to pay them three years after the date thereof, but if a peace should be concluded sooner between Great Britain and America, then six months thereafter, £95 15s 1d, sterling money.

The declaration states that on the ——— day of ——— ——— in the year of our Lord, 1780, Robert Hogg died, having made and duly published his last will and testament in writing; and thereof appointed James Hogg,

William Hooper, and James Burgess, executors; that on the 21st day of December in the same year, by indenture bipartite, bearing date the same day and year between James Hogg of the one part, and Samuel Campbell by the name and description of Samuel Campbell of New Hanover, of the other part; the said Samuel Campbell, by and with the consent of William Hooper and James Burgess, for and in consideration of four negro slaves, that same day sold and delivered to him by James Hogg, and in consideration of divers other matters and things thereafter to be performed by the said James Hogg, for the use and benefit of the said Samuel Campbell, did transfer and set over all his, the said Samuel Campbell's right, title and interest; that is to say one moiety of all debts or sums of money remaining due, and owing to the Co-partnership of Hogg and Campbell, or the Survivor thereof, or to the representatives of the deceased partner, for or by reason of the said Co-partnership, from whomsoever the same was due, upon account, bill, *bond*, note, agreement, or other writing, and all the claim and interest of him the said Samuel Campbell to the said debts: To have, hold, receive, and take the said debts, and every of them to the said James Hogg, his heirs, executors, &c., without account to the said Samuel Campbell: And he the said James Hogg, by the said indenture, did covenant with the said Samuel Campbell, that he would take upon himself the payment of all debts due by the Co-partnership to divers persons, and would at all times thereafter indemnify the said Samuel Campbell, his heirs, &c., from all actions, suits, &c., that might or should be brought against him, by reason thereof; and that he, the said James Hogg, would discharge and keep harmless the said Samuel Campbell, his executors, &c., of, and from all the debts which at the time of the death of Robert Hogg were due from the Co-partnership, and which at the making of the said indenture were then due and owing on account of the Trade and Co-partnership, between the said Robert Hogg and Samuel Campbell.

After the execution of this indenture, Samuel Campbell

attached himself to the British enemy, and left this country, and was thereby rendered incapable of carrying on suits at law. At an Assembly, held at Fayetteville, on the 18th November, 1786, an act was passed, entitled, "an act to enable the executors of Robert Hogg, deceased, to maintain and defend suits, under the regulations therein mentioned;" which, after reciting that it had been represented and proved to the General Assembly, that the said Samuel Campbell, while he was a citizen of this State, and before he withdrew from his allegiance to it, did assign, and set over, for a good and valuable consideration, all his right, title and interest, in and to all the debts due to all the said Co-partnership, to James Hogg, one of the executors and devisees of the said Robert; and that the said Samuel, by withdrawing himself, was disabled by himself or by others, to bring suits in his own name, and that by the death of Robert Hogg, the only mode of maintaining suits for the recovery of debts due to the said Co-partnership, agreeably to the laws then in force, must be in the name of the said Samuel Campbell, surviving Co-partner of Hogg and Campbell; and that thereby the executors of the said late Robert Hogg, were utterly prevented from recovering the just debts due to the Co-partnership so assigned, and were disabled to carry the Will of the said Robert into execution, and to pay his just creditors. It is therefore enacted, that the said James Hogg, William Hooper and James Burgess, be, and they were thereby authorized and empowered to maintain suits as well in law as in equity in the names of them the said William Hooper, James Hogg and Jas. Burgess, styling themselves executors of the said Robert Hogg, and in the names of the survivor or survivors of them, to sue for and recover all monies due to the Co-partnership, in their names as executors, and to have recoveries as fully and as amply in the same manner as Samuel Campbell himself could, if he had remained a true and faithful citizen of this State, and had never assigned his interest in the Co-partnership to the said James Hogg.

After the passing of the act of Assembly, William Hooper and James Burgess, died; and on the 20th day of April,

1796, James Hogg, as the surviving executor of Robert Hogg, dec, brought this suit, to which the defendant pleaded "General issue, set-off, and notice of set-off, payment at and after, &c."

In the year 1789, the defendant recovered against Campbell, the sum of £500 for negroes of the defendant, said to have been carried away by Campbell, when he attached himself to the enemy. At the trial of the cause, the plaintiff produced the bond declared on, as also the deed of assignment, and the act of Assembly, mentioned in the declaration, and on this rested his case. The defendant offered the judgment recovered by him against Campbell, as a set-off, which was objected to by the counsel for the plaintiff: the objection was sustained by the Court, (Haywood and Stone Judges, at April Term, 1797,) and the plaintiff had a verdict for the value of the sterling money, mentioned in the bond, but the jury having given no interest, the plaintiff moved for, and obtained a new trial, and the cause being tried at April Term, 1799, the Jury found the bond declared on to be the act and deed of the defendant, that the sterling money therein mentioned to be of the value of £212 15 9, and assessed the plaintiff's damages to £119 3 9 and costs: subject to the opinion of the Court on the following questions, viz:

1. Whether the bond declared on, is within the description of these debts which James Hogg is entitled to sue for, under the act of 1786?

2. Whether the bond declared on, is within the description of these debts assigned by Samuel Campbell to James Hogg, by the deed of assignment recited in the declaration?

3. Whether the defendant is entitled to a deduction of the judgment aforesaid as a set-off against the amount of the sum found by the jury?

Upon which questions the cause now came on to be argued.

Williams, for plaintiff. All demands which are unliquidated, and which found only in damages, are incapable of being set off: those demands for which an action of debt

or indebitatus assumpsit will lie, can only be set off. Principal and essential requisite to a debt, in order to its being set off, is that it should be mutual. Cowper's Reports, 56; Iredell's Rev., 172: The debts here claimed are not mutual. The debt claimed by the plaintiff, was contracted with the partners as joint merchants: The judgment obtained by the defendant, and now offered as a set-off, is obtained against Campbell in *jure proprio*, for a tort done to the defendant in carrying away his Negroes, a transaction which cannot by any means relate to the partnership concerns, and which took place after the death of Robert Hogg, the other partner, and the consequent dissolution of the partnership. There is no instance of a set-off having been allowed, where the debt demanded is not due to the same persons precisely as the debt to be set off is due from. If this judgment shall be allowed to be set off, the deceased partner, Robert Hogg, would be subjected to pay a judgment recovered against Campbell for a wrong of his own. If one man receive rent for another, after his death, by appointment in his lifetime, and then be sued by the executors, he cannot set off a debt due from the deceased; because the deceased never had any cause of action against him, Bull., 180; and so here the defendant never had any cause of action against the plaintiffs, and therefore ought not to be allowed to set off this judgment against him. With regard to the party against whom it may be set off, I take the distinction to be this. Where the debt offered to be set off is recoverable and payable out of the same fund that the debt to be recovered in the action goes to increase, it may set off. Where two plaintiffs sue, and the sum offered to be set off can be recovered of *one of them only*, it cannot be set off; or where one sues and the sum offered to be set off is due from that *one and another*, it cannot be set off; because in either case, the two actions cannot be reduced to one, by a set-off, without doing an injury to a third person, by subjecting him to the effects of an action, to which, before the act of set-offs, he would not have been subject. The act did not mean to extend the action of the defendant to a person not liable to it, *without the act;* but only to give him *the effect* of an

action against the plaintiff, to which the plaintiff was liable without the act, but not subject to by way of set-off; and the law is so, with respect to partnership dealings; the defendant cannot, by execution upon a judgment against one partner in his private capacity, seize and sell the whole partnership effects; he can only seize and sell the share of the partner against whom he has judgment, and the vendee becomes tenant in common with the other. If he cannot affect the other's share by judgment and execution, surely he cannot do it by set-off, which is in lieu of an action. Salk., 392. It is true, indeed, that by the death of Robert Hogg, the remedy to recover the partnership debts survived to Campbell; but it is the remedy only which did so, the interest of the deceased did not. It is a rule in the Law Merchant, that *jus accrescendi inter mercatores locum non habet.* 4 Term, 123, 5 Bac. Abr., 580, 589. The interest of Robert Hogg, upon his death, survived to his executors, though the right to recover and get in the debts due to the partnership, survived to Campbell, who by no conduct of his own, could burthen the share of his deceased partner with any incumbrance other than that to which it was subject at his decease. Though Campbell's share might have been liable had no assignment been made, yet as it was assigned, and for a valuable consideration, and that assignment legalized and confirmed by the act of Assembly, before the defendant obtained his judgment against him, his share passed to the assignee, and is not subject in his hands to this demand. From the time of the assignment, Campbell had neither interest in or remedy to recover this debt. He and his property are liable to the defendant's action on the judgment, and the defendant is liable for the bond to the action of other persons, where recovery will go to increase the fund of the assignee, which is not liable to pay the debt due to the defendant, and therefore the plaintiff is not such a person against whom the defendant's demand can be set off.

Haywood, for the defendant.—The debt here offered to be set off is not unliquidated, but is reduced to a certainty

by judgment. All the cases cited by the plaintiff's counsel in support of the position that unliquidated damages cannot be set off, do not apply to this case. It is wholly immaterial whether before judgment the demand was for damages uncertain or not. Whatever may have been the origin of the defendant's judgment, when the damages were ascertained and judgment rendered for them, they thenceforward were of equal dignity with a debt due by bond. Every set-off is in lieu of an action; and when the sum offered as a set-off can be recovered in an action of debt, &c., it may be set off: And there can be no doubt but an action of debt will lie on the judgment against Campbell.

I admit that mutuality of debts is necessary, in order to a set-off; but the legal interest is only to be considered in a court of law: The assignment at best vests but *an equitable* interest in the assignee; and the interest in his hands is subject legally to all the incumbrances it was before, had the assignment not been made. The share of the debts assigned is still legally considered due to the assingor. The assignment to third persons, operates nothing; and so far as it regards *the legal interest* of the parties, leaves them precisely in the same situation they were in before it; and laying aside the act of Assembly, a judgment recovered against Campbell might be set off against a debt to be recovered by himself: That act, for *the furtherance of justice*, has vested the executors of the deceased partners with the right of suing; but the debts recovered do, in contemplation of law, belong to Campbell. The executors by legislative creation are the representatives of the copartnership, and acting for it in the place of the surviving partner, and are subject to all such demands and actions as he is, and of course to an action for this debt, and consequently to the set-off. Viewing the case in this light, both the interest of Campbell, and Campbell himself by his representatives, the executors, are now before the court. This ought to be considered as the action of Campbell, to recover a debt which, both now and when recovered, the law deems payable to himself; consequently the debt sued for, and the debt offered as a set-off, are

mutual debts within the meaning of the act of Assembly and are clear of the objection endeavoured to be raised for want of mutuality. The act of Assembly is in derogation of the common law, and ought to be construed strictly. 5 Bac. Abr., 650; 10 Mo., 282. By it, the executors of Robert Hogg are empowered to sue, naming themselves his executors; but they do not sue as executors, they are put in the place of the surviving partner—they represent him; they are enabled to recover, not for the purpose of paying over to the assignee or his representatives, but for the purpose of paying the partnership debts: they are, for anything expressed to the contrary in this act, to pay the balance to the person entitled by law to receive it, and that person is the surviving partner. They can only recover in cases where he might, were he not disabled; and they are subject in like manner as he would be were the suit brought in his own name.

Johnston, J. The judgment pleaded as a set-off being founded on a cause of action which arose subsequent to the assignment by Samuel Campbell of his interest in the copartnership of Hogg and Campbell to James Hogg, cannot operate to discharge a debt due from the defendant to Hogg and Campbell, which debt appears to have been comprehended in the assignment. I am therefore of the opinion, that judgment should be entered for the plaintiff.

Taylor, J. The question for the opinion of the court is, whether this judgment recovered by the defendant in the year 1789, can be set off in this action, which is founded on a bond to which the plaintiffs acquired an equitable title in 1780, and a legal one in 1786. As to the effect of the assignment unaided by the act of Assembly, I cannot subscribe to the argument which asserts that it is a mere nullity, and therefore to be entirely disregarded in a court of law. The common law rule which, for the purpose of avoiding maintenance, prohibits the assignment of a chose in action, doth not, by its original meaning and spirit, require, nor hath the practical application of it justified, a construction so minutely rigorous. If a chose in action is assigned for lawful

cause, as for a just debt, it is to some purposes valid even at law. If the lawful cause is wanting, it is neither good in law or in equity. Bro. Abr., pl. 3. If one assign a bond over, though it be not in its nature assignable, yet it is a good agreement that the assignee shall have the money to his own use. 12 Mod., 554. In the same case, there will be found an instance of a master's assigning an apprentice-bond to another, the contract for which was held good between themselves. An assignment of a chose in action has been held a good consideration for a promise. 2 Bl. Rep., 820. And the power of assignment has, for the convenience of commerce, been extended to respondentia-bonds. Ibid., 1272. The case of *Wench* v. *Kaly*, 1 Term Rep., 619, and the others therein referred to, shew how far, and under what circumstances, a court of law has organized the real, though not the nominal parties to the suit, and protect their interest, whenever they were made known in a proper manner. All these cases serve to shew, that regard has been paid to such transactions, to a certain degree at least.

But the case of *Deering* v. *Carrington*, 12 W., 3 B. R., proceeds to a still greater length in the protection of such rights. "Where a bond is assigned over with a letter of attorney therein to sue, and a covenant therein not to revoke, but that the money should come to the use of the assignee, although the assignee be dead, yet the court will not stay proceedings in a suit upon a bond in the obligee's administrator's name, though prosecuted without his consent, for that those assignments to receive the money to the assignee's own use, with covenants not to revoke, and also with a letter of attorney in them, although they do not vest an interest, yet have so far prevailed in all courts, that the grantee hath such an interest, that he may sue in the name of the party, his executors and administrators." It seems to me, that on the authority of this case, a court of law might take notice of such an assignment as is there described, as to all purposes except suing in the name of the assignee: For if he may use the name of the obligee, and even of his representatives after his death, against their consent, and prosecute the suit

to judgment, notwithstanding any attempt on their part to stay the proceedings. If he may do these things, ought his right to be defeated by a release given to them, or payments made after notice of the assignment, or by any supervenient claim against the obligee?

The great change which has taken place in the contracts of men, from the improved state of society and the increase of commerce; the desire of giving facility to these transactions by which the circulation of a great proportion of the wealth of the country is promoted, and the superior estimation in which personal property is now held from what it formerly was, have contributed gradually to relax the rule from the rigour in which ancient writers have laid it down, as far as it respects personalty. Indeed, the rule itself contemplates a distinction between a chose in action real, and a chose in action personal; for Broke, after stating an instance, wherein a chose in action personal may be assigned, proceeds thus: "But a chose in action real, as entry he cannot grant over, and it is not like to a chose in action personal or mixed, as, debt &c." Hard. pl., 14. I am aware, and candour induces me to state, that many of the decisions I have referred to, have been considered by an able Judge as usurpations of a court of equity. *Bauerman* v. *Radenius*, 7 Term Rep., 666. To this opinion I must oppose the observations of another able Judge, in *Maske* v. *Miller*, 4 Term Rep., 340, the practice of this country (in respect of which I will state two cases in addition to those formerly mentioned; one was the case of *Fleming* v. *Theames*, tried at Fayetteville, in which I was counsel: It was an action of covenant brought upon an agreement for the delivery of specific articles; the interest in the paper was fairly assigned to a third person, and a memorandum to that effect was endorsed upon the writ. Before the trial, a release was executed by Fleming to Theames, who attempted to avail himself of it, but the court, without hesitation, rejected it. The other, ——— vs *Wilkinson*, was tried before Judge Haywood and myself at Halifax October Term, 1799; the circumstances of which were nearly similar): And lastly, though with less confidence,

my own opinion, that it is conformable to a correct, though liberal interpretation of the law.

If justice can be attained in a court of law, without violating the fundamental maxims upon which it proceeds, the parties ought not to be turned aside by refinements merely technical. What has been so often and so beneficially done, may safely be followed; and the security of men's rights requires that it should be, if upon examination it does not militate with those established principles which it is our duty to preserve.

2dly. But the Legislature in 1786, confirmed what the parties had done in 1780, and added the only circumstance it required to give it complete legal validity, the right of suing in the name of the assignee. The act does not profess to interfere with the rights of third persons; nor ought it to receive a construction that will in the least degree impair them. Whatever claim then existed against Campbell, in the shape of legal sets-off, were preserved to his debtors, who, if they might have enforced them against him at the period of the assignment, may also, as I conceive, against his assignees. This is a fair construction of an act of Assembly authorizing an assignment for a particular purpose. Even in negotiable instruments, if endorsed after they become due, the law is different on account of the general quality of negotiability conferred on them by statute. But what were the rights of the defendant when the assignment was confirmed? They were altogether vague and indeterminate, possessing no legal existence, and manifestly incapable of forming the subject of a set-off. Until judgment was rendered for the damages assessed by the jury, the defendant had no claim for any specific sum; in legal consideration, his right was not merely defined, but acquired by suit and judgment; and when this took place, Campbell was no longer his creditor.

It is worthy of remark, that the preamble of the act states that the assignment was made to James Hogg, one of the executors and devisees of Robert Hogg, for a good and valuable consideration; and the inconvenience sought

to be remedied, is the disability of the executors of Robert Hogg to recover the partnership debts, and thereby to carry the will of Robert into execution, and pay his just debts. These two circumstances strongly indicate, that Robert Hogg was substantially, as well as formally entitled to all the partnership rights, and that the recoveries authorized by the purview, were to be applied according to the direction of his will. But however this may be, it is clear the act gives them a right to recover all that Campbell himself was entitled to at that time: More than this would be derogatory to the rights of others, not parties to the act, and therefore unjust: Less than this, would be to leave the rights of the assignees at the mercy of Campbell, who, if he could rightfully charge them with a shilling after the assignment, either by his tortious acts or by contracting debts, might incumber the property assigned to the full extent of its value, and thus render the act of Assembly nugatory. For these reasons, I think the plaintiff should have judgment.

Macay, J. I am of opinion, that the bond declared on, is within the description of those debts which James Hogg, the plaintiff, is entitled to sue for, under the act of 1786, and is also within the description of those debts assigned by Samuel Campbell to James Hogg by the deed of assignment recited in the declaration, and for the reasons given, the judgment obtained by the defendant against Campbell, cannot be admitted as a set-off.

Judgment for plaintiff.

Note. See S. C. reported in 1 Hay. Rep., 471, and the cases referred to in the note thereto. See also *State Bank* v. *Armstrong*, 4 Dev. Rep., 519. *Haywood* v. *McNair*, 2 Dev. & Bat. Rep., 283. *Bunting* v. *Ricks*, 2 Dev. & Bat. Eq. Rep., 130.

THOMAS MITCHELL v. ROBERT BELL.—Page 17.

If an attorney promise his client, during the suit, to indemnify him against the consequences of it, the promise is without consideration and will not support an action.

This was an action on the case brought by Mitchell against Bell, an attorney in the superior court of law for the district of Halifax, in which the jury at October term, 1799, found the following verdict: "We find that the defendant did assume and assess the plaintiff's damages to £32 6s 7d, subject to the opinion of the court on the following case: That in the year 1792, the defendant, as attorney at law, instituted a suit on behalf of the present plaintiff Thomas Mitchell, against Dred Taylor, executor of Henry Taylor, deceased—*living William Lancaster, the other executor;* that Dred Taylor afterwards died, leaving Hardy Hunt and Henry Hunt his executors; that a scire facias issued at December court, 1792, against Dred Taylor's executors, and made them parties to the said suit—*living William Lancaster, the executor of Henry Taylor*—that at the time the scire facias was returned Bell, the defendant, who was the plaintiff's attorney in the aforesaid suit, promised the plaintiff, that in case he was nonsuited, thereby meaning cast or in any way defeated, that he the said Bell *would pay all costs*—that the present plaintiff was cast in the county court of Franklin, as appears by the record filed, and paid costs amounting to the sum of £32 6s 7d; and if the law is for the plaintiff, we find for the plaintiff; otherwise for the defendant."

This case was brought before the Judges at their meeting this term for determination.

JOHNSTON, J. The promise in this case, stated to be made by Bell, is founded on no consideration; therefore, I am of opinion the judgment should be entered for defendant.

Taylor, J. This action is founded upon an express promise made by the defendant, an attorney, that if the plaintiff should be nonsuited, or cast in the suit, he would reimburse him all the costs.

Were this an action against the defendant for mismanagement of the cause or neglect of duty, it would have been unnecessary to have stated any other consideration, than his undertaking the management of the suit. Every attorney receives the trust accompanied with responsibility to his client, for any loss occasioned by his improper conduct; in such a case it might be necessary to examine how far he is liable where the loss arises, rather from error in judgment than from neglect or positive misconduct, and likewise to ascertain under which of these two descriptions the defendant's conduct ought to be classed. But in this case all such enquiries are useless, because if the defendant is liable at all, he is so by virtue of his express promise, which would charge him without regard to the means by which the suit was lost.

As a *consideration* is indispensably necessary to support *every assumpsit*, it must be ascertained whether any exists in the present case—it is not pretended that the plaintiff paid anything at the time of the promise; or that he forewent any advantage or benefit that he might otherwise have had; the only consideration that can be possibly set up is, that he employed the defendant as an attorney, and in that character reposed confidence in him; but can that consideration be connected with this promise? I apprehend not, because it was perfectly past and executed.

All the indemnity legally resulting from such misplaced confidence, the plaintiff may enforce in another form of action; but to prevail in this, it ought to be shewn, that the undertaking of the defendant was in consideration of the plaintiff's employing him. It is true, that in some cases an assumpsit will lie, although the consideration is past, if there was a duty before; but in all of them the duty is co-extensive with the promise. In this case the duty extended

no further than a careful, diligent, and possibly skilful management of the suit; it did not go the length of making compensation to the plaintiff *if he failed in his suit at all events*, or under any possible circumstances.

This promise was altogether without prejudice to the plaintiff, or benefit to the defendant—the former would have been precisely in the same situation if the promise had never been made—the latter received no new confidence or reward for making it. It is within the idea of *nudum pactum* most completely. I am therefore of opinion that judgment be entered for defendant.

Macay, J. This undertaking or promise being wholly without consideration, is void.

Judgment for defendant.

Note.—See *Sweany* v. *Hunter*, 1 Murph. Rep., 181; *Johnson* v. *Johnson*, 3 Hawks, 556; *Hatchell* v. *Odom*, 2 Dev. & Bat. Rep., 302.

SARAH HAYES v. JOHN ACRE.—Page 19.

The action of assumpsit will lie on either an express or implied promise to pay for the use and occupation of land.

The record in this case stated it to be an action on the case for assumpsit, for use and occupation of land, brought in the Superior Court of Law for the district of Edenton, at April Term, 1800; there was a verdict for the plaintiff for £7 10. subject to the opinion of the court, whether the plaintiff can recover in this action for the use and occupation of land.

Johnston, J. I am of opinion that the action is proper, and that judgment should be entered for the plaintiff.

Taylor, J. It does not appear from the verdict, whether the action was founded upon an express or implied assumpsit: Upon the former I conceive the action was always maintainable, 1 Roll. Abr., 8: and there is an authority in

3 Mod., 73, which warrants the opinion that an assumpsit will lie on an implied promise for rent. The reason given for exclusively using the action of debt to recover rent, is quite technical and insufficient to overturn the established practice of the country, which is founded in justice and convenience. Many recoveries have been had in such cases upon implied promise, and this objection hath not to my knowledge ever prevailed—there ought to be judgment for the plaintiff.

MACAY. J. Upon the verdict in this case, the plaintiff ought to have judgment.

Judgment for plaintiff.

ABNER ALEXANDER, Guardian, &c. v. JEREMIAH BATEMAN.—Page 20.

Proceedings before a single justice cannot be brought before the county court by *certiorari* or other writ. They can come before it only by appeal.

This was a writ of error, brought in the Superior Court of Law for the District of Edenton, to reverse the judgment of the County Court of Tyrrell, in a cause between the above mentioned parties.

The record states that the plaintiff, Alexander, sued out a warrant against the defendant, returnable before one of the Justices of Tyrrell county: "pending the warrant, Bateman applied to the court to have the proceedings brought before them; which was ordered and accordingly done"—and at a court held for that county, October term, 1797, a jury was empanelled who found for the defendant; on which the plaintiff prayed a writ of error, and assigned the following errors, to-wit: "that by the laws of the land, the County Courts of Pleas and Quarter Sessions have no power to grant writs of supersedeas, certiorari, mandamus, or false judgment, or in any other manner to remove or correct the

judgment, sentence, or decree of any Justice of the Peace (out of session) except by appeal, which the court in this instance has undertaken to do. Wherefore the said Abner prays, &c." The defendant pleaded "in nullo est erratum."

JOHNSTON, J. The judgment and proceedings of the county court should be reversed and set aside, having no jurisdiction, such as they have exercised in this case.

TAYLOR, J. There is no power given to the county courts to direct proceedings had before magistrates, to be brought before them; their jurisdiction is confined to specified and enumerated objects—if it is extended beyond these in one instance, it will be difficult to fix the point where it shall stop.

The regulations which are made relative to appeals from the judgment of a magistrate, will be rendered nugatory by this novel mode of proceeding. Whatever is claimed to be within the jurisdiction of an inferior court, ought to be plainly shewn, as in pleading, nothing shall be intended within its jurisdiction, unless it be expressly alleged.

MACAY, J. The county court have exceeded their jurisdiction. Let their judgment be reversed.

Judgment reversed.

JAMES DALGLEISH v. CHARLES GRANDY.—Page 22.

A landlord has no power in this State to distrain for rent, the process of distress never having been adopted here.

This was a writ of error, brought in the Superior Court of Law for Edenton District, to reverse the judgment of the county Court of Pasquotank in a cause between the above mentioned parties.

The record stated this action to have commenced by a warrant of distress, issued by Grandy, the landlord, directed

to the Sheriff of Pasquotank, requiring him to go on the land where Dalgleish lived and to distrain so much of the property of said Dalgleish as would satisfy Grandy for one year's rent in arrear; being £150, and to cause the property so distrained, to be appraised and sold after the expiration of five days, except they should be replevied—in pursuance of which warrant, the sheriff distrained sundry articles of property belonging to Dalgleish, which were replevied. The warrant of distress and replevy bond were returned to the next Court of Pleas and Quarter Sessions, held for said county. The defendant Dalgleish, appeared by his attorney and pleaded "*nil debet*, payment and set-off, tender, refusal, release and satisfaction, with leave to give the special matter in evidence;" and at September term, 1796, a jury being empanelled, found for the plaintiff Grandy, and assessed his damages to £150 and costs; the defendant's attorney then moved in arrest of judgment, and filed his reasons, viz.: That the verdict is contrary to the bill of rights, the constitution, and the law of the land.—That the proceedings are illegal and irregular as they appear on the record, and that even supposing the verdict could be justified by the constitution and laws of the country, the plaintiff shewed no cause of action; which reasons being overruled, the defendant then prayed a writ of error, which was granted, and the cause brought up to the Superior Court.

It does not appear from the record, that any errors were assigned; but if they were, they must have been the same in substance and effect with the reasons in arrest of judgment. The question in this case was, whether the remedy elected by Grandy to recover the rent said to be due to him by Dalgleish, was a legal and constitutional one, or not.

Johnston, J. There being no laws in force in this State regulating proceedings on a warrant of distress for rent, I am of opinion that the judgment of the county court be reversed.

Taylor, J. I am not informed of any general usage in this State, which hath heretofore amounted to an adoption of the common and statute laws of England relative to dis-

tresses. They were anciently in the nature of pledges, which the distrainer had no power to sell, and the authority for that purpose is given by the statute of Will. and Mary, ch. 5, which is certainly not in force here. This warrant directs a sale after the expiration of five days, unless the chattels are replevied, thereby conforming to the provisions of the statute, which have no operation in this State. The process is in the first instance erroneous. But if this mode of proceeding had ever been sanctioned by custom before the revolution, it is utterly irreconcilable to the spirit of our free republican government. Justice does not make a distinction in favor of a creditor whose debt arises from the lease of land, rather than that of him who has hired a chattel; it does not require that the former should be entitled to a process *in rem*, when the latter can only proceed *in personam*, but *both* should ascertain their demand by the verdict of the Jury, allowing to the debtor an opportunity of contesting it, before his property is seized upon. The legislature has provided for these cases when it is expedient that property should be taken in the first instance, and their refusal to pass a law authorizing distresses, has been upon the ground that it is unconstitutional. I am of opinion that the judgment should be reversed.

MACAY, J. No such remedy for the recovery of rent as it is attempted to be used in the present case, is known in this State, and is contrary to the spirit of our laws and government, and cannot be supported.

Judgment reversed.

SILAS BRIGHT, BY GUARDIAN v. THOMAS WILSON and wife.—Page 24.

The action of waste will lie in this State.
It is not error for the judgment in an action of waste to be for the damages only and not also pro the place wasted.

This was a writ of error brought in the Superior Court of Law for Edenton District, to reverse the judgment of the

County Court of Currituck, rendered in a cause between the above mentioned parties. The plaintiff brought a writ of waste in the words following to-wit:—"State of North Carolina, to the Sheriff of Currituck county, Greeting: You are hereby commanded to summon Simon Wilson and Franky, his wife, that they be before the Justices of our county court of Pleas and Quarter Sessions, to be held at the court house of our said county, on the last Monday of February next, to answer unto Silas Bright, an infant, &c., by Aaron Bright, his father and natural guardian, in a plea why in the houses, lands and woods, in the county of Currituck aforesaid; which in the right of the said Franky, they hold for the term of the life of the said Franky, by the devise of Silas Bright, deceased, they have made waste, spoil, and destruction to the disinheriting of him the said Silas, against the provisions of law and to the damage of him the said Silas, 500 pounds, herein fail not," &c., which being executed and returned to February Term, 1797, the defendants appeared and pleaded "the general issue, with leave to give the special matter in evidence," and the cause was continued from term to term, till May Term, 1798, when a Jury being empanelled and sworn, found the defendants guilty of having committed waste in the premises charged in the plaintiff's declaration, and assessed the plaintiff's damages to £138, 8d, and costs, whereupon the defendants prayed, and were allowed a writ of error, and by their attorney assigned the following errors, to-wit: "That in the record and proceeding aforesaid, and also in giving the judgment aforesaid, there is manifest error, to-wit: that the declaration aforesaid, and the matters therein contained, are not sufficient in law for the said Silas Bright to have and maintain his aforesaid action thereof against the said Simon Wilson and Franky his wife—there is also an error in this, to-wit: that by the record it appears that the judgment aforesaid, in form aforesaid given, was given, for the said Silas Bright; whereas by the laws of the land, the said judgment ought to have been given for the said Simon Wilson and Franky, his wife,

against the said Silas Bright; and the said Simon Wilson and Franky his wife, pray that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed and annulled, and altogether held for nothing, and that they may be restored to all things they have lost by occasion of the said judgment.

William Slade, attorney for plaintiffs in error.

JOHNSTON, J. I am of opinion that the judgment of the County Court should be affirmed.

TAYLOR, J. No special errors are assigned in this case, and I have not upon a view of the record been able to discern any; the writ in its substantial parts is conformable to the precedent in the register, and though the judgment does not appear to be rendered according to 6 Ed. 1, for the place wasted, yet that omission being for the defendant's benefit, was not, I presume, intended to be assigned.

MACAY, J. I am also of opinion, that the judgment of the county court should be affirmed.

Judgment for defendants in error.

NOTE.—See *Ballentine* v. *Payner*, 2 Hay. Rep., 110 and the cases referred to in the note.

ISAAC GUION v. WILLIAM SHEPHARD, Treasurer of Public Buildings for Craven County.—Page 26.

In a writ of error, the errors must be assigned when the writ is filed, which must be fifteen days before the Superior Court.

The record in this case stated, that at a court held for Craven county, on the second Monday of September, in the year of our Lord one thousand seven hundred and ninety-eight, William Shephard, by Thomas Badger, Esq., his attorney, produced to the court the following notice against

Isaac Guion, late Treasurer of Public Buildings in Craven county, viz.:

"Newbern, 24th July, 1798.

"Sir, I received your note and should have no objection to your continuing to have the management of repairing the Jail, if with propriety, such a thing could be done; on examining the act of Assembly under which the Treasurer holds his office, I find that he alone is answerable for the proper disposition of the monies, and for the sufficiency of the repairs—he of course cannot delegate his authority to any other person. I must therefore insist that you pay over to me the amount of the monies in your hands, before the ensuing Court to be held for Craven county, otherwise I shall then move for judgment to be entered up against you ageeable to act of Assembly, for the amount and interest up to that time.

"I am your obedient servant,

"WILLIAM SHEPHARD.

"To Isaac Guion, Esq."

"July 26th, 1798, this day delivered Isaac Guion, Esq., a notice of which this is a true copy.

"WILLIAM DUDLEY, Dep. Sheriff."

On motion of the plaintiff's attorney, judgment was entered up against Isaac Guion, for the monies in his hands as late Treasurer, with interest. The defendant prayed and was allowed a writ of error, returnable to the March Term of Newbern Superior Court, 1799; and on the second day of April, 1799, being the 13th day of the Term of March, 1799, Edward Graham, Esq., attorney for plaintiff in error, assigned error the following words, to-wit: "The want of trial by jury," and the court ordered the following entry to be made on the minutes and records of the court for that day, to-wit: "the second day of April, 1799, being the 13th day of March Term, 1799.

"Isaac Guion,

"v.

"William Shephard, Treasurer, &c.

"Writ of Error. Errors assigned by the plaintiff in error this day, saving all objections of the defendant."

And now the question was, at what time ought the plaintiff in error to file his assignment of errors.

JOHNSTON, J. Errors should be assigned and filed with the proceedings at the time by law pointed out for filing them with the clerk of the Superior Court—I am therefore of the opinion that the writ of error be dismissed.

MACAY, J. The errors ought to be assigned and filed fifteen days before the time of holding the Superior Court of Law, to which the writ of error is returnable.

Writ of error dismissed.

NOTE.—Sec. 1 Rev. Stat., ch. 4, sec. 17, and the case of *Petty* v. *Jones*, 1 Iredell's Rep., 408.

WILLIAM CARTER, qui tem v. JOHN B. BRAND.—Page 28.

Where A. had a judgment and execution against B., and on the day of sale consented to indulge B. in consideration of a sum more than the legal interest for the time of indulgence, and afterwards the judgment together with this sum was paid; *it was held* that this was usurious, and that A. was liable in an action for the penalty, under the statute against usury.

This was an action of debt upon the statute of usury, commenced in the County court of Glasgow, to which the defendant pleaded *nil debet*, and stat. lim. The plaintiff had a verdict in the County court, and the defendant appealed to the Superior Court of Law for the district of Newbern, at March Term, 1799; the cause was tried, when the Jury found a special verdict, in the words following, to-wit: "That the defendant does owe the sum of two hundred and thirteen pounds ten shillings and six pence, and that the plaintiff instituted his action within the time limited by law, subject to the opinion of the court upon the following points reserved, viz.:

"1st. Whether this action is subject to the operation of the act of Parliament passed in the 31st year of Elizabeth, chap. v., and on a question arising out of these facts, which the Jury find, to-wit: That on the thirty-first day of January, one thousand seven hundred and ninety-four, the said William Carter was indebted to the said John B. Brand, in the sum of one hundred and six pounds eleven shillings and nine pence; for which judgment had been obtained, and execution thereon had issued, which execution the Sheriff had levied, and had appointed the said thirty-first day of January to sell the property levied on, to satisfy the same; and on that day the said John B. Brand did agree that the said sale should be postponed eighteen days, in consideration that the said Wm. Carter would pay him, the said John, ten dollars more than the legal interest arising on said sum: and afterwards the said John B. Brand, to-wit, on the eighteenth day of February next following, did receive from the said William Carter the amount of the said judgment, and also the said sum of ten dollars more than legal interest as aforesaid, for the said postponement and forbearance." And the question submitted to the court is, whether the case upon these facts is within the statute of usury. "If the opinion of the court upon the law and facts above stated is in favor of the plaintiff, they find for the plaintiff, and assess six pence damages and six pence costs; but if the opinion of the court should be in favor of the defendant, they then find for the defendant."

Johnston, J. From the facts stated in the special verdict I am of opinion that the contract is usurious, and that there should be judgment for the plaintiff.

Macay, J. I am clearly of opinion that the facts stated in the special verdict, amount to usury.

Taylor, J. Every case arising upon the act of assembly to restrain excessive usury, must be viewed in all its circumstances, so as to ascertain the real intention of the parties. If that be corrupt in the substance and design, no pretext however plausible, no contrivance however specious,

no coloring however artful, with which the transaction is veiled, will secure it from the censure of the law. *Crimen omnia ex se nata vitiat.*

I think this special verdict discloses a clear case of usury. There is a debt due and an agreement to postpone the sale by which it was to be satisfied, for a consideration of ten dollars beyond the legal interest. The actual receipt of the debt, as well as the excessive interest for the forbearance, is also found. No part of the principal is put in hazard, but the whole is actually secured by the levy ; nor is the agreement to pay the excess subject to any contingency, but is found to have been positive and absolute. In short, I do not perceive any principle upon which the attempt is usually made, to take cases of this sort out of the act of Assembly.

If the doubt arose from the circumstance, that the execution being levied, the plaintiff had therefore no right to postpone the sale, but could only use his good offices to that end with the Sheriff, I should not conceive it as making an alteration in the case. For although the law does upon the levy, vest a possessory property in the Sheriff to enable him to protect it from wrong doers, yet he is substantially the agent or trustee for the plaintiff as to the produce of the goods.—The law creates a privity between them, and will consider many acts done by the Sheriff, by direction of the plaintiff, as the acts of the plaintiff himself. Thus he may by parol, discharge a defendant when taken in execution upon a *ca. sa.*, and if a payment of the money to the Sheriff will, upon a *fi. fa.*, discharge the execution, by the same reason will a payment to the plaintiff himself, who may consequently put a stop to the sale. Cases might arise where a sale of all a defendant's property was about to be made under such circumstances, as that the judgment could not possibly be discharged, when perhaps a postponement of the sale would produce a different result. Cases of combination also between the Sheriff and the bidders, might be checked by the timely interposition of the plaintiff, and thereby much future litigation saved. I think from the statement in this case, that the postponement and forbearance, must be considered as the acts of

the then plaintiff; and that if they were not so, nothing would be more easy than to evade the act upon which this suit is brought.

Judgment for plaintiff.

The Judges gave no opinion in this case respecting the operation of the act of Parliament, passed in the 31st year of Elizabeth, chap. v.

JOHN LEAKE, ex'r, &c. v. JOHN MURCHIE, surviving partner of James Galloway & Co.—Page 32.

A writ of error may be granted upon notice to the attorney at law who obtained the judgment, when the party resides out of the State.

This was a motion made in Salisbury Superior Court of Law, March Term, 1800, for the allowance of a writ of error upon a judgment obtained by Murchie, the surviving partner of James Galloway and Co. v. Leake, executor of Rose, in the county court of Rockingham.

The plaintiff in error produced the affidavit of one Matlock, stating that he had delivered a written notice to the attorney, who obtained the judgment in the county court, that the executor intended moving for a writ of error at this term; the affidavit also stated, that Murchie, the surviving partner, was an inhabitant of the State of Virginia; and the question reserved for the opinion of the Judges at their meeting at this term, was, whether notice to *the attorney* who obtained the judgment complained of, was sufficient notice to authorize the court to grant the writ of error.

The act of Assembly authorizing the Superior Courts to grant writs of error, to correct the errors of any inferior court, to prevent obtaining writs of error by surprise, requires "that

the party praying such a writ in a civil cause, shall give notice in writing to the *adverse party*, at least ten days before motion of his intention to move for such writ; and no such writ shall be granted without affidavit of such notice. Vide Iredell's Rev., p. 307, 47 Sec., Ch. 2, act 1777.

JOHNSTON and MACAY, J. We are of opinion, that notice to the *attorney* at law who recovered the judgment complained of, is sufficient notice to authorize the Superior Court of Law to grant the writ of error.

Writ of error allowed.

JOHN ARMSTRONG, et al. v. WILLIAM BEATY, et al.—Page 33.

When a defendant is served with a copy of a decree of the Court of Equity, and refuses to perform it, an attachment is the proper mode of compelling performance.

This was a case in equity from Salisbury district; the record states, that at September Term, 1799, the complainants obtained a decree against the defendants, and had legally served them with a writ of execution of the said decree, as appears from the return made on said writ by the Sheriff of Lincoln—it further states, that William Beaty, one of the defendants, hath absolutely refused, and still doth refuse to perform the said decree: and the question reserved for the opinion of the Judges at their meeting this term, was, what process is proper to enforce compliance with a decree made by the Superior Courts of Equity.

JOHNSTON and MACAY, J. The defendant William Beaty, having been duly served with a copy of the decree made in this case, and having refused to perform that decree, we

are of opinion that an attachment ought to issue to compel a performance.

NOTE.—In decrees of a Court of Equity for any sum of money execution may issue as at law. See 1 Rev. Stat., ch. 32, sec. 6.

DUNCAN M'AUSLAN, et al. v. JOHN GREEN, et al.—Page 33.

Under the act of 1784 (see 1 Rev. Stat., ch. 64, sec. 1) a widow of an intestate dying without children is entitled to only one-third part of his personal estate.

The Court of Equity allowed commissions at the rate of five per cent. only, though the County Court had allowed at the rate of ten per cent. on the whole amount of the estate.

This was a case in Equity from the district of Newbern. The bill states that the complainants are the brothers and sisters of Alexander M'Auslan, late of Newbern, dec., who died intestate, possessed of a large personal estate, *without issue*, leaving Sidney M'Auslan, since married to Furnifold Green, one of the defendants, his widow. The bill charges, that by act of the General Assembly, made for settling intestates' estates, the estate of their deceased brother ought to be divided into three equal parts, one of which should be allotted to the said widow, and the remaining two-thirds equally divided among the complainants, who are the next if kin to Alexander M'Auslan, deceased. The bill then states, that Sidney M'Auslan, widow of the deceased, and John Green of Newbern, administered on the estate of Alexander M'Auslan, and that the widow afterwards intermarried with Furnifold Green, and that the whole estate of the deceased has come to the hands of the said administrator.

The answer of Furnifold Green and Sidney his wife, admits the death of the intestate Alexander M'Auslan, and that she with John Green one of the defendants administered on the estate and that the personal estate of the said Alexander

M'Auslan to a large amount, after paying debts, &c., has come to their hands, but insists that she is entitled to one-half of the clear surplus of the said estate.

The answer of John Green, the other defendant, also admits the death of Alexander M'Auslan, intestate, and that he with Sidney M'Auslan his widow, since married to Furnifold Green, obtained administration on his estate, that he hath sold the personal estate to a large amount, and hath paid to Sidney, wife of Furnifold Green, and to him in right of his wife since their marriage, nearly one-half of the clear surplus of said estate, upon the supposition and belief that she was entitled to *one-half*, there being no issue. His answer then insists that he is entitled to retain a commission of ten per centum on the whole amount of said estate, which was the allowance made him by the county court of Craven, on the settlement of his accounts. It is admitted by the other defendants that he alone has had the care and management of the estate.

Two questions were referred to the Judges for their decision in this case:—

1. To what share of the personal estate of Alexander M'Auslan who died intestate, *without issue*, is his widow entitled?

2. Ought any commissions to be allowed the administrator for his care and trouble; if any ought to be allowed, at what rate per centum?

Johnston, J. The widow has a claim to no more than *one-third* of the intestates' estate, and a commission of five per centum is fully adequate to the services of the administrator, such as they appear to me.

Macay, J. I am of opinion that the widow of the intestate, is entitled *to one-third part* of the personal estate, and to *no more*. Acts of 1784, Sec. 8, and Chap. 22: and that commissions ought to be allowed at the rate of five per centum.

Decree accordingly.

Note.—On the allowance of commissions to executors and administrators, see *Hodges* v. *Armstrong*, 3 Dev. Rep., 253, and *Walton* v. *Avery*, 2 Dev. & Bat. Eq. Rep., 405.

WILLIAM SPENDLOVE v. JANET SPENDLOVE, et al.—Page 36.

The Court of Equity will issue a writ to the sheriff to take out of the defendant's possession, property, which is the subject of a suit, if it appear that there is danger of the removal of the property, unless he gives security for its production, &c.

This was an original bill, brought by Peter Mallett and Edward Jones, Esquires, attornies in fact for the complainant, who is an inhabitant of the Island of Jamaica. The bill states, that the complainant and the defendants are the natural children of Goodin Elletson, formerly of Bladen county, who was possessed of a large estate, consisting of lands and negroes; and being so possessed, on the 29th of July, in the year of our Lord 1783, made his last will and testament in writing whereby he devised all his estate, both real and personal, to be equally divided between and among them, the said Janet, Roger, and William Spendlove, his natural children, share and share alike, and to their heirs, &c., forever.

The bill further states, that after the death of Goodin Elletson, the defendants possessed themselves of his whole estate; that a Court held for Bladen county, in February, 1790, made a division of the negro slaves of the testator, and allotted twenty-six negroes as the proportion of the slaves which the complainant was entitled to under the will aforesaid.

The bill then states, that the said slaves allotted to the complainant were hired by the County Court of Bladen to the defendants, for one year, and an order was made by said Court, directing the defendants to hire out said negroes each and every year, and to make return of the hiring to the next succeeding court: This never was done by the defendants, but they kept possession of the slaves and worked them for their own use and benefit.

The bill then states that the defendants have wasted all their own estates both real and personal, and that the complainant is convinced it is their intention to send off or dispose of such of the slaves as they can, before they can be recovered from them in the usual course of law; and that they have now no visible property, whereby the complainant or any creditor can have satisfaction for any recovery to be had or made of them. The bill then prays a decree for the said slaves and the profits of their labour, and prays a writ to the Sheriff of Bladen, or to such other person as the court shall direct, empowering and directing him to take into possession, all and singular the negro slaves divided and allotted to the complainant as his share and portion of the negroes of the estate of the late Goodin Elletson, dec., and their increase; to be hired out, and to be subject with the profits thereof to such order and decree as the court shall make in the premises; on condition to be released if the defendants shall give security in such sum as the court shall direct, to be accountable for the delivery of the said slaves whenever a recovery should be had.

An affidavit was made by the said attornies in fact to the truth of the said bill.

The defendants filed a plea and demurrer to the bill; but the question for the consideration of the Judges, was, whether or not it was proper to direct the issuing of the writ prayed for by the complainant commanding the Sheriff of Bladen county to take the said slaves into his possession and to hire them out, &c., unless the defendants gave bond and security for the delivery of them on the determination of the suit.

After some time taken for the consideration of this question,

Johnston and Macay, J.—directed a writ to be framed agreeable to the prayer of the bill, which being made was signed by them.

STATE v. JAMES GLASGOW.—Page 38.

The words "good and lawful men" in the caption of an indictment, inquest, &c., mean freeholders.

The civil division of the State into counties, &c., must be taken notice of judicially by the courts.

If a public officer, entrusted with definite powers to be exercised for the benefit of the community, wickedly abuses or fraudulently exceeds them, he is punishable by indictment, though no injurious effects result to any individual from his misconduct. The crime consists in the public example, in perverting those powers to the purposes of fraud and wrong, which were committed to him as instruments of benefit to the citizens and of safety to their rights.

The Secretary of State of the State of North Carolina, whose duty it was under an act of the Legislature to issue land warrants under certain circumstances, was held liable to be indicted in the courts of this State for fraudulently issuing such warrants, though the title to the lands for which the warrants were issued was in the United States, and not in this State.

At a court begun and held at the City of Raleigh, on the tenth day of June, in the year of our Lord one thousand eight hundred, and in the twenty-fourth year of the independence of the State, before the honorable Spruce Macay, John Louis Taylor, and Samuel Johnston, Esquires, Judges of the Superior Courts of Law and Courts of Equity, of and in the said State, assigned by letters patent under the great seal of the said State, made to them the aforesaid Judges, and also to the honorable John Haywood, as one of the said Judges, or to any two or more of them, by virtue of an act of the General Assembly, entitled "an act directing the Judges of the Superior Courts to meet together to settle questions of Law and Equity arising on the circuit, and to provide for the trial of all persons concerned in certain frauds," and to enquire (by the oaths of good and lawful men of the counties of Wake, Franklin, Johnston, Chatham, Orange and Cumberland, and any of them, and by other ways, methods and means by which they might or could the better know) more fully the truth of all offences

and frauds committed within any district of this State, by any person or persons whomsoever, (who hath or have been duly apprehended, or shall or may be apprehended to answer the same, where such offences have been committed on or in the office of the Secretary of State, or on or in the office of John Armstrong, or on or in the office of Martin Armstrong, in the fraudulently issuing, procuring, receiving or transferring land warrants, or in the fraudulently issuing, procuring or receiving grants on such warrants at any of the said offices; of all frauds and offences of all and all manner of persons whomsoever, concerned in the commission of any of the said frauds within any of the districts of this State, by whomsover or howsoever, had, done, perpetrated or committed, and by what person or persons, and to whom, how, and in what manner, and of all articles and circumstances howsoever concerning the premises, and any of them, and to hear and determine the same according to the laws of this State; and also the said judges and any one or more of them, to enquire as aforesaid concerning all and singular the premises, and any two or more of them, to pass final sentence on such person or persons as shall be convicted upon such inquiry to be had as aforesaid according to the laws of this State; by the oath of Pleasant Henderson, &c. [here follows the names of the grand jury,] good and lawful men of the counties aforesaid, then and there duly empanelled, sworn and charged to enquire for the State. It is presented in manner and form as follows:

The jurors for the State upon their oath present, that by an act of the General Assembly, entitled, "an act to amend an act, entitled an act for the relief of the officers and soldiers of the continental line, and for other purposes," passed at Hillsborough on the eighteenth day of April, in the year of our Lord one thousand seven hundred and eighty-three, the Secretary of State was directed to issue a warrant of survey to each and every person entitled to land by virtue of the said act, entitled "an act for the relief of the officers and soldiers of the continental line and for other purposes therein mentioned," for such quantities of land within the

limits of the land reserved by the act last mentioned for the said officers and soldiers, as he, she or they, by the said act, should be entitled to; which warrant should be directed to Col. Martin Armstrong, who was appointed by the act first mentioned, Surveyor for that purpose, and was authorized and required to execute and return the same into the Secretary's office within the same time, and in the same manner as is required in other cases: and the said Secretary of State was required by the said act first mentioned, to make out grants for all surveys which should be thus returned to his office; which grants should be authenticated by the Governor, countersigned by the said Secretary, and recorded in his office.

The jurors aforesaid upon their oath aforesaid, do further present that James Glasgow, of the county of Greene, Esquire, on the seventh day of January, in the year of our Lord one thousand seven hundred and eighty-six, and in the tenth year of the independence of the said State, at the said county of Greene, within the jurisdiction of their honorable court, then and there being Secretary of State of the said State of North Carolina, and being then and there in the exercise of the said office, and being empowered and entrusted by law with the issuing of land warrants as aforesaid, unlawfully, wickedly and fraudulently, and in violation of the duties of his said office, did make out a certain fraudulent writing, purporting to be a duplicate military land warrant in favor of the heirs of Elijah Roberts, a private in the line of this State, for six hundred and forty acres of land, within the limits of the land reserved for the officers and soldiers as aforesaid, and he the said James Glasgow did then and there sign his name to the said writing as Secretary of State, and issued the same from his said office, as a true, good and lawful military land warrant; when in truth and in fact, he the said James Glasgow then and there well knew, that an original warrant had been previously made out and issued by him the said James Glasgow, as Secretary of State aforesaid, to the said heirs of the said Elijah Roberts, for his right as a private in the said

line; and he the said James, had no right nor authority by law to make out or issue any other such warrant to such heirs for said right, to the great damage of the State, &c.

The jurors aforesaid on their oath aforesaid, do further present, that a certain James Mulherrin afterwards, to-wit, on the first day of January, in the year of our Lord one thousand seven hundred and eighty-nine, and in the thirteenth year of the Independence of the State, under colour of a certain unlawful and fraudulent writing, purporting to be a duplicate military land warrant, and to be issued on the seventh day of January, in the said year one thousand seven hundred and eighty-six, by the said James Glasgow as Secretary of State, in favor of the heirs of Elijah Roberts, a private in the line of this State, for six hundred and forty acres of land within the limits of the land reserved for the said officers and soldiers aforesaid, did illegally and fraudulently procure and cause to be made in favor of him the said James Mulherrin, a certain survey of six hundred and forty acres of land in Davidson county on Hickman creek, &c., [the courses of the land,] and did afterwards, to wit, on the first day of May, of the said year one thousand seven hundred and eighty-nine, fraudulently return the said survey, together with the said last mentioned illegal and fraudulent writing, purporting as aforesaid into the said office of Secretary of State, in order to obtain a grant from the State to him the said James Mulherrin, for the said land last mentioned—he the said James Mulherrin pretending that a certain Elijah Robertson had assigned to him the said James Mulherrin, the said last mentioned illegal and fraudulent writing, purporting as aforesaid—so as to entitle him the said James Mulherrin to obtain the said grant in his own name, although he the said James Mulherrin did not produce to the said Secretary of State any legal evidence to prove that he the said Elijah Robertson was entitledby law to the military land warrant of the heirs ot the said Elijah Roberts, so that he the said Elijah Robertson had legally assigned the same to him the said James Mulherrin, so as to entitle the said James Mulherrin to obtain a grant for the said land last mentioned to himself as aforesaid.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said James Glasgow, on the eighteenth day of May, in the year of our Lord one thousand seven hundred and eighty-nine, and in the thirteenth year of the Independence of the State, at the said county of Greene, within the jurisdiction of this honorable court, then and there being Secretary of State, and in the exercise of the same office, and being entrusted by law with the making out grants as aforesaid, well knowing that the said writing purporting to be a duplicate military land warrant, was illegal and fraudulent; an original warrant having previously been issued for the same right, by him the said James Glasgow as Secretary of State as aforesaid; and that the said James Mulherrin, had not produced to him the said James Glasgow as Secretary aforesaid, any legal evidence to prove that the said Elijah Robertson was entitled by law to the military land warrant of the said heirs of the said Elijah Roberts, deceased, or that the said Elijah Robertson had legally assigned the same to him the said James Mulherrin so as to entitle the said James Mulherrin to receive a grant to himself for the said land last mentioned, unlawfully, fraudulently and wickedly, and in violation of the duties of his said office, did make out a certain fraudulent grant from the State, to him the said James Mulherrin, for the said six hundred and forty acres of land, situated and bounded as aforesaid, and did then and there cause the said grant to be authenticated by the Governor, and did countersign the same himself as Secretary of State, and recorded it in his said office to the great injury of the State, &c.

The jurors aforesaid, upon their oath aforesaid, do further present, that the said James Mulherrin, afterwards, to-wit, on the first day of February, in the year of our Lord one thousand seven hundred and ninety-three, and in the seventeenth year of the Independence of the State, under colour of a certain illegal and fraudulent writing, purporting to be a duplicate military land warrant, and to be issued on the said seventh day of January, in the said year 1786, by the said James Glasgow, as Secretary of State as aforesaid, in

favor of the heirs of Elijah Roberts, a private in the line of this State, for six hundred and forty acres of land, within the limits of the land reserved for the officers and soldiers aforesaid, did illegally and fraudulently procure, and cause to be made in favor of him, the said James Mulherrin, a certain other survey, for six hundred and forty acres of land lying on Mill creek, on the south side of Cumberland river, and bounded as follows: beginning, &c. [corners of land], and did afterwards, to-wit, on the eleventh day of May, in the said year of our Lord one thousand seven hundred and ninety-three, fraudulently return the said survey, together with the said last mentioned illegal and fraudulent writing, purporting as aforesaid into the said office of Secretary of State, in order to obtain a grant from the State to himself for the said land last mentioned; he the said James Mulherrin pretending that a certain Elijah Robertson had assigned to him, the said James, the said illegal and fraudulent warrant, so as to entitle him, the said James Mulherrin, to obtain the grant in his own name, although he, the said James Mulherrin, did not produce to the said Secretary of State, any legal evidence to shew that he, the said Elijah Robertson, was entitled by law to the military land warrant of the said heirs of the said Elijah Roberts, deceased, or that the said Elijah Robertson had legally assigned the same to him, the said James Mulherrin, so as to entitle the said James Mulherrin, to obtain a grant for the land last mentioned to himself, as aforesaid, and although he the said James Mulherrin, had, previously, to-wit, on the eighteenth day of May, 1789, aforesaid, obtained a grant from the State to himself, for another tract of six hundred and forty acres of land, before that time surveyed, in virtue of the said last mentioned illegal and fraudulent writing, purporting to be a military land warrant.

And the jurors aforesaid, on their oath aforesaid, do further present, that the said James Glasgow, on the seventh day of January, in the year of our Lord, one thousand seven hundred and ninety-four, and in the eighteenth year of the Independence of the State, at the said county of Greene,

within the jurisdiction of this court, then and there being Secretary of State as aforesaid, and in the exercise of the same office, and being entrusted and empowered by law with the making out grants as aforesaid, well knowing that the said last mentioned warrant as aforesaid, was illegal and fraudulent as aforesaid, an original land warrant having been previously issued for the same right by him, the said James Glasgow, as Secretary aforesaid; and that the said James Mulherrin had not produced to him the said James Glasgow, any legal evidence to prove that the said Elijah Robertson was entitled by law to the said military land warrant of the said heirs of the said Elijah Roberts, deceased, or that he the said Elijah Robertson had legally assigned the same to the said James Mulherrin,so as to entitle him the said James Mulherrin to obtain a grant to himself for the said land last described, and also then and there well knowing that he the said James Mulherrin, had previously obtained a grant from the State to himself for another tract of land in virtue of the said last mentioned illegal and fraudulent writing purporting as aforesaid, unlawfully, fraudulently and wickedly, and in violation of the duties of his office, did make out a certain false and fraudulent grant from the State to the said James Mulherrin, for the said six hundred and forty acres, situated and bounded as last aforesaid, and did then and there cause the said grant to be authenticated by the Governor, and did countersign the same himself, as Secretary aforesaid, and recorded it in his office, to the great detriment of the State, to the evil and most pernicious example of all others in the like case offending, and against the peace and dignity of the State.

To this indictment he pleaded "not guilty," and a Jury being empanelled and sworn to try the issue between the State and the said James Glasgow, found him guilty in manner and form as he was charged in the bill of indictment.

The counsel for the defendant moved for a new trial upon several grounds, but relied chiefly on the ground of the verdict being contrary to the evidence. The Court

declared they were satisfied with the verdict, and refused to grant a new trial. The Attorney General then prayed for judgment against the defendant, when *Haywood* for the defendant moved in arrest of judgment and filed his reasons, to-wit :

1. The caption does not state any legal authority in this Court to take the said indictment ; the commission is stated to be made to the Judges to enquire by the oaths of good and lawful men of the counties of.....and there is no law of this State which authorizes an enquiry otherwise than by the oaths of freeholders.

2. The caption does not state the indictment to have been found by the oaths of freeholders.

3. There is no such commission as that stated in the caption ; the commission by virtue whereof this Court sits, is a commission to enquire of the offences committed in the office of the Secretary of State, or in the office of Martin Armstrong, or in the office of John Armstrong, in, &c., but the commission described in the caption is to enquire of offences in the two former offices only.

4. The commission by virtue whereof this Court sits, is to enquire by the oaths of freeholders, whereas the commission by virtue whereof the indictment is stated so to be taken, is to enquire by the oaths of good and lawful men only.

5. The several offences in the indictment mentioned, are supposed to have been committed on the several times therein mentioned at the county of Greene, within the jurisdiction of this Court: not stating the said place to be within any of "*the districts of the*" State, whereby the Court might see that the said offences were committed within the extent of their jurisdiction ; and in fact at those several times, there was no such county as the county of Greene within any district.

In the first count of the said indictment, it is not stated otherwise than by implication, that any original warrant

had issued before the issuing of the duplicate therein mentioned.

The original warrant so stated by implication, is not described nor set forth so as to shew to the Court that the duplicate therein mentioned in a copy thereof, and for the same lands and number of acres, and in favor of the same person and for the same claim the duplicate is.

It is not stated in the said first count, that any injury did actually ensue the issuing the said duplicate.

The original warrant stated by implication, is stated to have been issued to the heirs for the right of the deceased, which is repugnant.

The second count states that the said James Glasgow, well knew that the said warrant had been legally assigned to the said Mulherrin, so as to entitle him to receive a grant: all that part of the sentence after the and or, being governed by the antecedent words *well knowing*, and not by the antecedent words *had not;* and therefore it was in law no crime to issue the said grant to Mulherrin, and yet in contradiction to this plain consequence, it states the said grant to have been issued unlawfully, fraudulently and wickedly.

It is not alleged in the second count, that Mulherrin did not produce evidence of his right, but only said although he did not, which is not any positive averment:

It states the issuing a grant, knowing that one original warrant had issued, not averring that a grant had issued upon the original, or that it was intended to issue upon the same, or that the original was in being.

In the last count it is not stated that a grant had issued upon the same duplicate, that any former grant had issued upon, but only that it issued upon the duplicate mentioned in the last count.

In the last count it is not avered that a grant issued upon the duplicate therein mentioned, previous to the issuing the grant therein stated to be issued on the seventh day of January, one thousand seven hundred and ninety-four, but only the well knowing that Mulherrin had previously obtained a grant then issued, that stated in the said count,

which is not any positive averment that two grants issued thereon.

The fraud therein stated is supposed to be committed against the State of North Carolina, when at the same time it appears that the lands stated to be included within the description of the grant, were not the lands of North Carolina, but of the United States, and that such fraud as is in the indictment supposed, is subject to the cognizance of the Courts of the United States, and consequently not of any Court in this State.

J. HAYWOOD.

MACAY, J.—delivered the opinion of the Court.

As our opinions rest upon a few plain and obvious principles, it is unnecessary to enter into an elaborate examination of the cases cited in support of this motion. They are generally speaking good law, (though to this, the case cited from 1 Dyer, 69, forms an exception,) but we do not think they apply to the case under consideration.

With respect to all those reasons which proceed upon the ground that the expressions "good and lawful men" are inserted in the caption and commission, instead of the word "freeholders," the answer is, that these words are to be understood according to the subject matter relative to which they are applied. In this instance, the words are used as forming an inquest; and an inquest formed of good and lawful men, must be of freeholders. *Liberos et legales homines*, are the terms which have always been used in the venire facias, and their legal import and signification is freeholders, without just exception. 3 Bl. Com., 351; 4. Bl. Com., 350. But even an objection to the caption of an indictment, founded in the omission of such words, ought not to prevail, especially if the indictment be in a Superior Court, and that which is omitted be in common understanding, implied in what is expressed. 2. Haw., cap. 25, sec. 126.

The exception arising from the supposed error in setting out the commission, is not founded in point of fact, and has therefore been abandoned in the argument.

It is certainly an undeniable rule, that the place where an offence is stated to have been committed, must appear to be within the jurisdiction of the court which tried it; and the question for us to decide, is, whether the county of Greene does not appear to be within the jurisdiction of this Court? This court is authorized by the commission to enquire into any offences it describes, which were committed within any district of the State; the county of Greene is within a district of the State: and thence it necessarily follows, that it is also within the jurisdiction of this Court. The civil divisions of the territory of the State into districts, and their subdivision into counties, serve to define and limit the boundaries of jurisdiction allotted to the Superior Courts; in this respect they form an essential part of the public law of which the Court can no more be ignorant than of the fact, that every County in the state is within some one of its districts. Thence, if an offence is laid to be committed in a county, corresponding in name with one in the State; we must in reference to the extended jurisdiction of this Court, understand it to be one and the same. Would it not be fanciful and extravagant to presume it to be out of the State? And why make the presumption that it has been ceded to Congress, when we know the fact is otherwise? Besides, the offence is laid to have been committed by the Secretary of State, being there (in the county of Greene) in the exercise of the said office; here again, in order to give effect to this objection, we must make another unreasonable presumption, that the Secretary of State was exercising his office, and did issue from his office out of the State, this military land warrant. But in truth, if it had appeared on the trial, that the offence was committed without the limits of the State, the defendant would have been discharged for want of jurisdiction. But if the place laid is within the jurisdiction of the Court, a mistake in that point would not have been material, unless the place had formed a part of the description of the offence, and was not stated merely as a venue. 4. Bl. Com., 306. In fine, the reasoning upon which all the cases are founded, which were cited to prove the necessity

of naming the ville, is obviously inapplicable to the present topic; because the jury are summoned altogether from other counties, than that where the offence is laid to have been committed. As to the objections made to the first count, it is to be remarked that the gist of the offence there stated, is the fraudulently issuing a duplicate warrant, knowing the original to have been previously issued. We do not think it necessary that a positive allegation should have been made, that the original was issued, but it was necessary that proof to that effect should have been made on the trial, and it accordingly was made. In principle, the same objection was made in *Rex* v. *Lauby*, 2 Str., 904, and overruled. If a positive averment of the issuing the original warrant was unnecessary, it follows that the objection growing out of its not being particularly described, must also be invalid.

It is further objected that no injury is stated to have ensued the act of thus issuing the duplicate.

If the act was done in the manner charged in the indictment, and as the jury have found it, the defendant has certainly committed a misdemeanor, which is indictable at common law. No rule of law requires, that a circumstance which forms no ingredient in the crime, should be stated in the indictment; and if a public officer, intrusted with definite powers to be exercised for the benefit of the community, wickedly abuses, or fraudulently exceeds them, he is punishable by indictment, although no injurious effect results to an individual from his misconduct. The crime consists in the public example, in perverting those powers to the purposes of fraud and wrong, which were committed to him as instruments of benefit to the citizens, and of safety to their rights. If to constitute an indictable misdemeanor a positive injury to an individual must be stated and proved, all those cases must be blotted out of the penal code, where attempts and conspiracies have been so prosecuted; yet they are numerous and authoritative. 3 Bac., 549, in notis, new edition.

The offence charged in the second count succinctly stated, is this, that the defendant issued a grant to Mul-

herrin upon a duplicate warrant, which had been previously issued to the heirs of E. Roberts, the right to which Mulherrin claimed under an assignment from Elijah Robertson. In order to fix this as a fraudulent act upon the defendant, it is deemed necessary by the drawer of the indictment to describe the agency that Mulherrin had in the business; accordingly the count begins with stating the steps taken by him, in order to obtain the grant, pretending that Robertson had assigned the warrant to him, although he did not produce any legal evidence to prove either Robertson's title or his assignment; and the offence as laid, consists in issuing the grant under all the circumstances of the application made by Robertson, and with a full knowledge of them. These are therefore repeated in the second branch of the count, and introduced by the participle "knowing" which necessarily refers to the whole of them, and carries the sense throughout the whole paragraph which contains the recital of Mulherrin's acts or omissions. The sense of the whole count aids the construction, and unless the former is separated from the latter part of it, it is understood upon reading thus—that the defendant well knowing that the duplicate was illegal, &c., well knowing that Mulherrin had not produced to him any legal evidence to prove that E. Robertson was entitled, &c., or to prove that he had assigned it to Mulherrin, fraudulently issued the grant, &c.

The four following objections to the second count, have been substantially answered in noticing the exceptions to the first. What concerns the essence of the crime and the gist of the charge, is laid with certainty sufficient to enable the defendant to know the offence wherewith he is charged, and to enable the court to discern upon the record a crime punishable by law: In misdemeanors, where no particular technical phrases are appropriated to describe the act, nice and overstrained exceptions have not usually prevailed. 2 & 3 Bur. Rep. The last reason is founded upon the supposition, that the lands stated to be included within the description of the grant, were not the lands of North Carolina, but of the United States, and it is thence concluded, that

the fraud is exclusively cognizable in the courts of the United States. However the fact may be as to the title of the lands, the defendant was a public officer of the State of North Carolina, and it was by virtue of that character alone that he was enabled to commit the offence charged in the indictment. All his acts wore the semblance of official duties, and but for the enquiry now instituted, might still retain the stamp of public authenticity. By his signature the faith of the State was pledged for the purity and honesty of the documents to which it was annexed, and her character, honor and dignity, required that it should never be pledged in vain. The security of the citizens' rights, no less than the reputation of the State, was intimately connected with a faithful discharge of the duties appertaining to an office of such high importance ; a confidence commensurate therewith was reposed in him, and this, after patient examination, is found by the jury to have been abused in the particulars charged. To the jurisdiction of the State therefore, we think he is strictly and properly amenable.

Reasons overruled.

STATE v. SUE, Slave of John Gates.—Page 54.

Under the act of 1741, (Iredell's Rev., ch. 24,) authorizing the County Courts to pass such judgment upon a slave convicted of any other crime or misdemeanor than conspiring to rebel or making insurrection (for which the punishment of death was prescribed) as the nature of the crime or offence shall require ; the court cannot pass sentence of death for any crime or offence for which a freeman would not also be liable to be so punished.

The prisoner had been tried in the County Court of Person, on a charge of giving or procuring to be given to William Cocke and several of his family, to-wit, Sarah, Polly and Susanna, all of the same county, a poison supposed to be arsenic, with an intent to kill the said persons, and was found guilty of the fact by the jury impanelled and sworn to try the issue ; on which conviction, the justices present,

passed the following sentence: "That the prisoner Sue, is guilty of death under the act of Assembly in that case made and provided, and that the said Sue, on Monday, the 14th day of April, 1800, be taken to the place of execution, and between the hours of 11 and 4 o'clock of that day, she be hanged by the neck until she be dead."

On the first day of the Superior Court of Law held for the district of Hillsborough, on the 6th day of April, 1800, by his Honor Samuel Johnston, Esq., *Duffy*, on an affidavit, stating the trial, conviction and sentence passed by the court of Person, on the said slave Sue, moved for and obtained writs of *supersedeas*, *certiorari*, and *habeas corpus*, directed to the sheriff and justices of the said county, in consequence of which, the sheriff of Person brought up the said slave to the Superior Court, together with the record of her trial, conviction, and of the sentence passed on her; and *Jones*, Solicitor General for the State, moved that she should be sent back to receive the sentence of the County Court, which was opposed by *Duffy* for the prisoner, who contended that the County Court of Person had no authority to pass sentence of death on the prisoner, the crime of which she was convicted, being one of such a nature as was not *by the laws of the land punishable with death*, and he cited Iredell's revisal, laws of N. Carolina, Act of 1794, chap. 11, sec. 1, which enacts "that it shall hereafter be the sole duty of the jury sworn on the trial of any slave or slaves, to give a verdict of guilty or not guilty, on the evidence submitted to them by the court, and on the verdict so given in by the Jury, it shall be the duty of the County Court when sitting on the trial of any slave or slaves, or of three justices when they shall be sitting on any such trial, to pass judgment and sentence on the slave or slaves so tried before them, agreeable to the verdict of the jury, and the *laws of the country*." This act, he contended, gave the court no power to inflict any other or more severe punishment on a slave when convicted of an offence, than by the

laws of the country, a freeman would be subject to on conviction of an offence of the same nature; that the offence of which the prisoner was convicted was such a one, as if committed by a freeman would not subject him to the loss of his life; that the Legislature had no intention to punish slaves in a more sanguinary manner than freemen convicted of the same offence; and that a supposition to the contrary was a charge against the Legislature of violating the laws of humanity.

It was contended by *Jones*, Solicitor General for the State, that there was no doubt but that the General Assembly intended to make a difference in the trials of slaves and of freemen; that this intention was apparent and obvious, by having reference to the several acts of the Legislature prescribing the mode and regulating the trials of slaves, particularly one passed in the year 1741, Iredell's Rev., 94, ch. xxiv., entitled "an act respecting servants and slaves," in the 48th section of which act it is enacted "that every slave committing such offence, (meaning conspiring to rebel, make insurrection, &c., as mentioned in the 47th section,) or any other crime or misdemeanor, shall forthwith be committed by any justice of the peace to the common jail of the county within which the said offence shall be committed, there to be safely kept; and that the Sheriff of such county, upon such commitment, shall forthwith certify the same to any justice in the commission of the said court, for the time being, resident in the county, who is thereupon required and directed to issue a summons for two or more justices of the said court and four freeholders, such as shall have slaves in the said county; which said three justices and four freeholders, owners of slaves, are hereby empowered and required, upon oath, to try all manner of crimes and offences that shall be committed by any slave or slaves, at the court house of the county, and to take for evidence, the confession of the offender, the oath of one or more credible witnesses, or such testimony of negroes, mulattoes, or Indians, bond or free, with pregnant circumstances, as to them shall seem convincing, without the solemnity of a jury; and the offender being then

found guilty, to pass such judgment upon such offender, according to their discretion, as the nature of the crime or offence shall require; and on such judgment to award execution." He contended that the subsequent acts of the Legislature, respecting the trials of slaves, by no means restricted that discretionary power which the act of 1741 gave to the county courts in passing such judgment upon slaves as the nature of the crime or offence of which they might be convicted, required; that the expression contained in the act of 1794, declaring it to be the duty of the county court sitting on the trial of any slave or slaves, to pass judgment on the slave or slaves so tried before them, agreeable to the verdict of the jury, and the *Laws* of the country, means those laws only which have been passed to regulate the trial of slaves, not the laws of the country the benefit of a trial by which freemen claim and are allowed; that the public good frequently required that slaves should be punished by death for offences, which if committed by freemen, would not be so dangerous in their consequences, and therefore not in them deserving so severe a punishment—that the great misfortune of having slaves among us cannot now be remedied, and the Legislature from the laws they have enacted on the subject, appear to be impressed with the necessity of punishing crimes and offences committed by them with great severity; which seems to be the reason why the punishment of offences committed by them, is left in the discretion of the Court before whom they are tried, whom the Legislature thought would be competent to decide how far the public good might require that particular offences should be punished with more severity than others—that the County Court having exercised the discretion which the act of 1741 gave them, by sentencing the prisoner to be punished with death; that the Court ought to presume it done for the public welfare, and not reverse their judgment and sentence.

This case being wholly new, his Honor Judge Johnston desired that it should be adjourned to the meeting of the Judges at this term, when it came on to be argued by *Jones*, Solicitor-General for the State, and *Duffy* for the

prisoner, both of whom argued as in the Superior Court of Hillsborough, and cited the same Acts of Assembly, and which renders repetition of them here unnecessary.*

Johnston, J. It does not appear to me from any construction which I can make of the laws of this State, respecting the punishment of slaves, that they are made liable to be punished with death, in any case where the like punishment is not by law to be inflicted on a freeman, except only in the cases mentioned in the 47th section of the act concerning servants and slaves, passed in the year 1741.

I cannot prevail on myself to adjudge in any case, that a crime shall be punished with death, unless there is an express law for that purpose, and am of opinion that no implication, however obvious, can be admitted in such case, and that the discretion allowed in these cases, must apply to the *quantum or measure*, not the *degree* of punishment.

Therefore it is my opinion that the judgment be reversed, and that the prisoner be remanded to receive such other punishment, *short of death*, as the court who tried her shall think just, so that the same be warranted by the laws and constitution of the State.

Taylor, J. In ascertaining the true construction of the act, it is necessary to take into view some others which have been made relative to the same subject. The whole are founded on a principle of severe policy, absolutely necessary to guard society against the evil consequences resulting from the condition of slavery. Where some offences had been previously provided against, in an act passed the same session, one perhaps at the time of frequent occurrence, in the nature of a conspiracy by three or more to rebel or murder, is by this act made punishable with death; the next clause requires that upon a slave being convicted of any *other crime or misdemeanor*, such

* The Reporter was present and took notes of this case when argued in Hillsborough Superior Court, and the arguments being nearly the same in both Courts, he has given them as made in the former.

judgment shall be past, according to the discretion of the Court, as the nature of the crime shall require. These expressions do, in my opinion, give the Court a power to inflict any punishment upon any crime or misdemeanor, where a specific punishment had not been previously directed by law. In such cases the prescribed punishment must be inflicted, but in all others the Court are to regulate their discretion by the nature of the crime. This will depend upon their frequency, enormity, the temptation to commit them, the necessity of an example, and a variety of other circumstances, that ought, in a peculiar manner, to be considered in estimating the offences of these persons.

It certainly could not be the intent of the Legislature that they should be punished according to the ordinary penal code, for then it were unnecessary to have gone further than a simple regulation of the trial, and not to have said anything about the punishment; and because by the former act, the offence of stealing certain property is punishable with whipping and the pillory; whereas stealing money would only be punished by burning in the hand. This is a discrimination in favour of an offence of equal magnitude, which I do not think the Legislature intended to make. The act of 1786, Iredell's Revisal, page 588, does in the preamble recognize the fact, that many persons by cruel treatment to their slaves, cause them to commit crimes for which they are executed. It then proceeds to take away the allowance which had been theretofore made to the owners of such slaves.

The cruel treatment here alluded to must consist in withholding from them the necessaries of life, and the crimes thence resulting, are such as are calculated to furnish them with food and raiment. It then appears that in 1786, the Legislature was perfectly aware, that from 1741 until that time, it had been the practice to execute slaves upon a conviction of grand larceny, when free persons were only burnt in the hand, and they have not declared that this is a false exposition of the law. It seems to me that the acts subsequently made, had no other end than to extend to them the trial

by jury and to ascertain the respective provinces of the Court and the jury, still leaving the discretion of the former as to the punishment unlimited as the first act had made it.

I am sensible that the law is a harsh one, and I fear that abuses have been committed under it; but these may be controlled by the Legislature whenever they think fit to interpose. Thinking as I do, from the short time I have had to deliberate on this case, that their intention is free from doubt, a sense of duty compels me to pronounce it, however repugnant it may be to my private notions of humanity.

Macay, J. The Act of Assembly passed in 1741, sec. 47, of chap. xxiv., makes the consulting, the advising, the conspiring, to rebel, to make insurrection, the plotting or conspiring of three or more slaves to murder any person or persons whatsoever, to be felony, and on conviction to suffer death. Sec. 48 of same chapter directs the manner in which every slave committing such offence, or any other crime or misdemeanour, shall be tried, and what evidence shall be admissible, and directs the three justices and the four freeholders, on the slave or slaves being found guilty, "to pass such judgment on such offender, according to their discretion, as the nature of the crime or offence shall require, and on such judgment to award execution." The offence found by the jury in this case, is *an attempt* to poison, therefore the offence does not come under the description of any of those offences enacted by the 47th section; had the act stopped here, she must have been acquitted. But section 48 empowers the three justices and four freeholders to try her for any *other crime or misdemeanor*, and to pass such judgment, according to their discretion, as the nature of the offence may require.

Crimes and misdemeanors were offences known by the law at the time of passing this act, and the punishment also known and established. The offence found against Sue is an attempt to poison; if the same offence was committed by a free person, it could not be punished with death—it is only a misdemeanor of an aggravated nature, and could be punished with fine, imprisonment and other corporal punish-

ment; no judgment of death could be given. The punishment of this particular offence was known when the act passed; the act has made no alteration in the punishment, it was then discretionary with the court. It never was conceived that the court could give judgment of death for this offence; they could fine, imprison, or inflict other corporal punishment as had been established by common usage. The discretion given by the act of Assembly is a legal discretion, not the power of altering punishments, or affixing to any offence, a punishment unknown to the law. This would be for the court to legislate, not to adjudicate, a power unknown to any of the courts of this State. The justices of the county court have pronounced a judgment different from the nature of the offence, which the jury have found against the prisoner: their discretion only extends to increasing or diminishing the punishment. Let the judgment pronounced by the said justices against the prisoner be reversed, and the prisoner be remanded to said justices to receive such judgment as the laws and constitution of this State will warrant.

NOTE.—The sections of the act of 1741, under which the question in this case arose, have been superseded by later provisions. See 1 Rev. Stat., ch. 111.

THE STATE v. JOSEPH HARGATE.—Page 63.

A defendant in an indictment is not bound to pay the witnesses for the State, except upon conviction.

The record in this case stated that the defendant had been indicted in the Superior Court of Law for the district of Salisbury, for grand larceny, and upon his trial was found *not guilty*, on which he was ordered by the Court to be discharged upon the payment of costs. *Williams* (of Chatham), counsel for the prisoner, prayed that the following question should be submitted to the consideration of the Judges at

their meeting at this term, viz.: Whether a person being tried and acquitted on an indictment for felony, shall be liable to pay the witnesses summoned in behalf of the State, for their attendance? The question was directed to be brought up, which was accordingly done, and now at this term it came on to be argued by *Williams* for the defendant, and the Attorney and Solicitor General for the State.

Counsel for the defendant. The practice which has heretofore prevailed of subjecting persons who have been indicted for felony and acquitted, to the payment of the witnesses summoned on behalf of the State, appears not only unjust, as a payment of costs is some punishment on the innocent, but to be a practice against the express law of the land. In Iredell's Revisal, Laws N. Carolina, p. 363, ch. 4, sec. 19, it is declared, that great injustice is done to witnesses appearing in behalf of the State, by their having no allowance for their attendance at the Superior and County Courts as such; for remedy of which it is enacted, That from the passing of this act, such witnesses shall be allowed the same for their daily attendance as is allowed to witnessess attending upon civil prosecutions, and such fees for attendance shall be paid by the defendant "*upon conviction*," and if the State shall fail upon the prosecution of any offence of an inferior nature, the court may, at their discretion, order the costs to be paid by the prosecutor, in case such prosecution shall appear to have been frivolous or malicious; and in case the defendant shall not be able to pay the costs, or the court shall not think fit to order the prosecutor to pay the same, that then, and in that case, the clerks of the Superior Courts and County Courts, shall grant a certificate of attendance to such witnesses in manner as tickets are directed to be granted to witnesses in civil causes; and such tickets may be received by the sheriff in payment of public dues. The expression made use of in the act, "that such fees for attendance shall be paid by the defendant *upon conviction*," implies, in the strongest terms, that the defendant shall not be subject to the payment of such fees for attendance of witnesses *when acquitted* of the

charge exhibited against him, but *upon conviction* only; and that as the defendant in this case was acquitted on the indictment preferred against him, that it would not only be unjust but illegal to tax him with the payment of the attendance of witnesses summoned in behalf of the State, to establish a charge, which upon fair and legal investigation proved groundless.

Counsel for the State. The practice in the Superior Courts of this State, with respect to the payment of witnesses for attendance in behalf of the State by the defendant, has been uniform and invariable ever since the passing of the act of 1779; which was passed, as is declared in the preamble to the xix. section, to remedy the injustice done to witnesses who attended on behalf of the State, and who before that time had no allowance for their attendance; and this practice has applied as well where the defendant *has been acquitted as upon conviction.* In every case where the bill of indictment has been found to be true by the grand jury, the court have ordered the defendant to pay all the costs incurred in carrying on the prosecution, even although on the trial of the issue of traverse joined between the State and the defendant, he hath been acquitted. This practice having commenced with the existence of the act of 1779, serves to shew that the construction put upon it by the courts of that day is correct, and that the practice was by them deemed strictly consonant with the law. For if a person charged with a crime of a capital nature was to be liable for the payment of the State's witnesses, *upon conviction only*, and the court having in such case no authority to order the prosecutor to pay the costs, then would the witnesses be left wholly unprovided for, a situation in which it is clear the Legislature never intended to leave them, but to relieve them from which this act of Assembly seems to have been expressly passed. The power of the court to order the prosecutor to pay the costs, extends to prosecutions for offences of *inferior nature only*, and not to prosecutions for offences of higher degree; and the present prosecution being for an offence of the latter description, the witnesses

for the State will not receive any compensation for this attendance, unless the practice which has so long and uniformly prevailed, be now adhered to.

The counsel for the defendant replied, after which the following opinions were pronounced :

JOHNSTON, J. I am of opinion that the defendant is not bound to pay the witnesses summoned on the part of the State, but on his conviction by the Petit Jury.

TAYLOR, J. The act of 1779 does not extend to charge a defendant with the payment of the witnesses on behalf of the State in any cases of acquittal. A conviction is the only case where he is so liable—nor is provision made for the payment of witnesses in any case, except the defendant is convicted, or where being acquitted upon an inferior charge, the court exercise the discretion of ordering the prosecutor to pay the cost. Upon the rule that a statute giving costs shall be construed strictly, they cannot do this where the defendant is acquitted upon a capital charge. The manner in which witnesses for the State shall be paid when the defendant is acquitted on a charge wherein the court have no authority to order the prosecutor to pay them seems to be *casus omissus.*

MACAY, J. Before the act of the General Assembly, passed in 1779, witnesses appearing in behalf of the State were not paid. By the 19th section of that act, *upon conviction*, the defendant must pay the witnesses for the State —on an acquittal he is not to pay such witnesses for their attendance. Judgment for the defendant.

Note.—An act of Assembly passed this year, after the foregoing decision, explaining the former law on this subject, and making various regulations respecting the payment of State witnesses. Vide Acts of 1800, chapter 17.

NOTE.—See *State* v. *Whitted*, 3 Murph. Rep. 223, and 1 Rev. Stat., ch., 35, sec. 27.

THE STATE v. ERASMUS CUMPTON.—Page 67.

While the law was, that all simple assaults should originate in the County Court; where an indictment was found in the Superior Court "for assault with intent to murder," and upon a trial the jury found the defendant not guilty "of the assault with intent to murder, but guilty of an assault," *it was held* that the Superior Court had jurisdiction to pronounce judgment on the defendant.

The defendant was indicted at Hillsborough Superior Court, April Term, 1800, for an assault upon one Absalom Knight, with an intent to kill and murder, and upon the trial of the issue of traverse the jury found the defendant not guilty of an assault "with an intent to murder, but guilty of an assault, and the court fined him twenty shillings." The question reserved for the consideration of the judges in this case was, whether, as the defendant had been indicted for an assault, with an intent to murder, and the jury had found him not guilty of an intent to murder, but guilty of an assault, had the Superior Court jurisdiction of the offence found by the jury. The doubt as to jurisdiction arose from the sec. 8, ch. 3, of the acts of 1790, Iredell's Rev., page 696—which enacts that *all indictments for assaults, batteries and petit larcenies, and actions for slander*, shall in future originate in the County Courts of Pleas and Quarter Sessions only.

Per Curiam. The Superior Court has jurisdiction of the offence charged in the indictment, and on the finding of the jury there ought to be judgment for the State.

Judgment for the State.

Judge JOHNSTON observed in this case, that the defendant might have pleaded that the assault charged was a common assault, and traversed the intent to murder, that therefore the court had not jurisdiction, &c.

NOTE.—The Superior Courts have now concurrent jurisdiction with the County Courts of all kinds of assaults. 1 Rev. Stat., ch. 31, sec. 20.

JUNE TERM, 1800.

HILARY BUTTS'S ADM'RS v. ISAAC PRICE.--Page 68.

Letters of administration granted in another State will not entitle the administrator to maintain a suit here.

This was an action of Detinue brought by the plaintiffs, administrators of Hilary Butts, deceased, in Salisbury Superior Court of Law, to recover a number of negroes in the possession of the defendant. The jury sworn to try the issues joined between the parties, found the following verdict : " We find that Hilary Butts, in his lifetime, was possessed in his own right of the negroes Mary, Phœbe and Lydia, and of the negroes Bacchus and Nat, children of the said Mary, as in the plaintiff's declaration mentioned, and that the said several negroes were taken away by force from Hilary Butts, by persons unknown to this jury, and that the defendant does detain the negroes, of the value of, &c. We, the jury, further find, that the plaintiff's claim to the said negroes, under letters of administration granted to the plaintiff Mary Scruggs, wife of Richrd Scruggs, by Theophilus Lundy, Register of probates in the county of Effingham, in the State of Georgia, bearing date the 1st day of December, 1783. We also further find, that the said negroes were in this State in the lifetime and at the time of the death of the said Hilary Butts. If the law be for the plaintiff, we find for the plaintiff, and assess the damages, &c., and if the law be for the defendant, we find for the defendant."

The question reserved for the opinion of the court is, whether letters of administration granted in the State of Georgia, shall be valid, and entitle the administrators to recover in this State, property which was in this State, at the time the intestate died, under whom the plaintiffs claim.

By the Court. The only point in this case upon which

we deem it proper to give an opinion, is that which is specially stated and made the question upon the record; for being thus particularly reserved by the court, it is to be intended that they wished it to undergo a further consideration, and that the parties expected by its decision to have a decision of the cause. Had the facts alone been found by the jury, and the verdict left at large for the judgment of the court, the application of the law to it must have been guided by all the circumstances of the case, and then it would have been competent to enquire whether the objection made by the defendant to the letters of administration could be attended to, after pleading to issue. But as the objection was received by the court, who have not suggested any doubts as to the mode of making it, but have desired a determination purely on its merits; as this court has no power to correct the errors or reverse the decision of any other; and more especially, because it would introduce much confusion, and defeat the end for which this court was established, if, when one question was especially referred to them, they should decide the cause upon others which might be collected from the record, we think ourselves confined to the question which has been made. Upon that some decisions have heretofore taken place in the Superior Courts, in conformity with the cases to be found in the books tending to shew that letters of administration granted in a foreign country, will not enable the administrator to recover goods. The reasons of those cases in England, arising from the peculiar organization and powers of the Ecclesiastical Courts, may not apply with sufficient force to this country, to warrant the adoption of the doctrine in its full extent, but so far as their analogy extends to prove that an administration granted in another State will not enable the administrator to recover goods of the intestate situated in this, their authority is supported by justice, reason and convenience compelling the person to whom administration is granted, to give security for the payment of debts, prevents injustice being done to the creditors here, who may have trusted the intestate, upon the faith of the property he possessed, and

who would otherwise be under the necessity of pursuing the administrator into other States. A different policy, or a collision of laws might there postpone the priority he had here, and perhaps in some instances deprive him of his debt, notwithstanding the most diligent endeavors to procure payment. In addition to the propriety of affording all possible security to the creditors in this State, cases may arise where a foreign administration may be obtained upon effects here which may thus be removed to another State, although the intestate might have died without relations, entitled to a distribution, either by the laws of one country or the other. Our act of Assembly, which in such cases vests the goods in the State, after payment of debts, would become nugatory.

NOTE.—See *Anonymous*, 1 Hay. Rep., 355, and the second note thereto. See also *Nisbet* v. *Stewart*, 2 Dev. & Bat. Rep., 24.

SAMUEL VANCE v. CALEB GRANGER'S EX'RS.—Page 71.

An injunction or order of the Court of Equity, directing a promissory note to be deposited with the Clerk and Master, by which the plaintiff was delayed in bringing his suit, will not prevent the commencement or stay the operation of the statute of limitations.

This was an action on the case, brought in the Superior Court of Law for Wilmington district, on a note, to which the defendants pleaded general issue, set-off, and statute limitations.

The jury find the note was executed by Caleb Granger, on the 13th July, 1785, for the sum of one hundred and thirty pounds 4s. 3d. They also find that by an injunction issued 7th July, 1787, by order of the Hon. Samuel Ashe, Judge in the Court of Equity, and an order of the said court, that the note aforesaid was lodged in the hands of

the Clerk and Master in Equity, and that it appears to them that thereby the plaintiff was hindered from bringing suit on said note, that he afterwards brought suit on the 14th February, 1791; we further find that there is due to the plaintiff, on a note, the sum of £150 10s. 1d.

The question arising on this special verdict, was, whether the plaintiff's demand was barred by the act of limitation.

By the Court. Whatever hardship there may be in this case, there is no legal ground or principle to warrant the court to render judgment for the plaintiff. The act of limitation would amount to a general and positive bar, were not certain exceptions contained in the proviso; we cannot add to these others, which the Legislature has omitted; nor construe cases to be within the saving, which is plain were not meant to be included. A Court of Equity has, under circumstances similar to the present, interposed its authority to restrain a defendant from pleading the act; but as a question of law, the decision must be for the defendant.

THE EXECUTRIX OF JOHN ESTIS v. JOHN LENOX.—Page 72.

This was an action of debt brought in the lifetime of the plaintiff's testator, to recover the penalty of fifty pounds, created by chapter 4 of acts of 1791, against those who should harbor or maintain any runaway slaves: To this action the defendant pleaded general issue, statute of limitations. After issue was joined, and before trial, Estis died, and his executrix, the present plaintiff, applied for, and obtained leave to carry on the suit; on the trial of the cause, the plaintiff had a verdict, and the defendant's counsel moved an arrest of judgment for the reason following: That the action of debt founded on the penal statute made and provided in this case, is not such an action as will survive to

Executors or Administrators: and therefore judgment ought to be given for the defendant. The question for the opinion of the court was upon the sufficiency of this reason.

By the Court. The recovery in this action is of a forfeiture for an offence described in the act of 1799, ch. 11, sec. 4, which being unaccompanied with a duty, and arising simply *ex maleficio*, the suit will be neither for nor against Executors. The penalty is given for the offence merely, without reference to the actual loss or damage which the testator's property may have sustained; and in this respect the case is to be distinguished from those, where executors may bring certain actions which yet, on account of the form of pleading, would not survive against them; as in the action of trespass, for taking any goods in the lifetime of the testator, the value of the goods as well as the injury done, will be estimated in the damages. The same principle extends to an action of trover for a conversion committed in the lifetime of the testator, and to any other action which is maintainable by the Executor.

With respect to the act of 1786, ch. 14, sec. 1, its manifest intent was to enable Executors and Administrators to carry on such suits only, as might have originated, or such as might have been commenced against them. The common law principle, relative to the dying of personal actions with the person, retained the same operation after this act, as it possessed before. This construction, which hath uniformly prevailed, since the passing of the act, hath received a legislative sanction, by the act passed in 1799, whereby the actions of ejectment, trover, detinue and trespass, where property is in contest, are allowed to be revived. By enumerating these cases, and specifying one species of the action of trespass, which may survive, it is perfectly just, that all other cases which were affected by the maxim, continue still to be so.

JOSHUA FREEMAN v. JESSE LESTER.—Page 73.

Where under the act of 1795 (New Rev., ch. 433) a treasurer of public buildings was elected by the County Court, and afterwards another person was elected to the same office under the act of 1797 (New Rev., ch 488) and brought suit against the first for money remaining in his hands, *it was held* that the court would not decide incidentally on the constitutionality of the latter act, but that in that case its authority was sufficient to sustain the action.

The following case was agreed to by the counsel of the parties: Lester was elected Treasurer of Public Buildings by the County Court of Surry, at.....Term, 1796, under the act of the General Assembly, passed in the year 1795, who gave bond and security for executing his office, and continued in the same, til 1798, when the Court of Surry proceeded, under the Act passed at the Session of the General Assembly in the year 1797, to the election of a Treasurer of Public Buildings, when Joshua Freeman, the present plaintiff, was elected by a majority of the Justices of the said County, and entered into bond and security for the performance of his duty.

Freeman gave Lester ten days' notice, that under the last mentioned Act, he should at the next Court to be held for said County, move for judgment and award of execution against him, for all monies which he had received, as the former Treasurer, and which he had failed to account for and pay over to his successor in office. It is admitted by Lester that he received the sum of two hundred pounds from the Treasurer of the State, to be expended according to the directions of the act of 1795.

The County Court gave judgment for the sum of two hundred pounds, with interest, agreeable to the act of 1797, from which judgment Lester appealed to the Superior Court for the district of Salisbury.

Duncan Cameron, attorney for plaintiff.
Francis Locke, attorney for defendant.

The question arising on this statement is, whether, after Lester had been appointed under the act of 1795, the act of 1797, vacating his office, was a constitutional law or not.

By the Court. We cannot thus incidentally decide upon the validity of the act by which Lester was removed from his office. That its authority was sufficient to sanction the present action, and to justify the recovery made, cannot admit of any serious doubt.

NOTE.—On the point which the court refused to decide incidentally, see *Hoke* v. *Henderson*, 4 Dev. Rep., 1, where the court decided that the act of 1832, respecting the election of clerks by the people, was unconstitutional and void, so far as its provisions had the effect of removing clerks then in office, before their regular terms had expired.

JOHN G. BLOUNT, Adm'r of Daniel Neale v. WILLIAM HADDOCK.—Page 75.

Slaves, to whom the wife has a right in remainder, do not vest in the husband' if he die during the coverture, without having reduced them to possession.

This was an Action of Detinue brought in Newbern Superior Court of Law, for a Negro man named George. Pleas non det. and stat. lim. The cause was tried at March Term, 1800, and the following special verdict found:— "That the Negro in question was the property of William Taylor, who on the 26th May, 1765, made a deed of gift of the same to his daughter, Sarah Taylor, in the words following, to-wit: "North Carolina, Pitt County: To all whom these presents shall come: Know ye, that I, William Taylor, of the County and Province aforesaid, for the love, good will and affection which I have and do bear towards my daughter, Sarah Taylor, have given one Negro Boy named George, which said Negro Boy I do by these presents, fully, freely, and absolutely give, grant, and bequeath to my said daughter Sarah, to her, her heirs and assigns

forever, reserving the use of the said Negro to me, my wife Dinah, during our natural lives, and after our decease to be her own right and property, which said negro I promise myself, my Executors, to warrant and defend to her, the said Sarah, against the lawful right, title or claim of any person whatever. In witness whereof, I, the said William Taylor, have hereunto set my hand and seal, this 27th May, 1765.

his
WILLIAM ✕ TAYLOR.
mark.

Signed, sealed and delivered in the presence of
Martin Nelson,
Mary Nelson,
and
Mary Edwards.

May Court, 1765 : ordered to be registered."

That Sarah, the daughter, afterwards intermarried with Daniel Neal, the plaintiff's intestate; that the said Sarah died about the year 1775, and the said Daniel soon afterwards; that William Taylor, the donor, died in the year 1794; and Dinah, the wife of the donor, died in the year 1795; that the said William Taylor and Dinah, his wife, continued in the possession of the said negro until their deaths. The jury pray the advice of the court, if the plaintiff be entitled to recover.

By the Court. As this property never vested in possession during the coverture of the plaintiff's intestate with his wife Sarah, he could only have recovered in the event of his surviving the donor and his wife, by taking out administration upon his deceased wife's effects. And even then the property would have been assets in his hands to pay the debts of his wife, contracted while she was sole. Upon his death, his administrator can recover at law, only such things, whereof he might have acquired the possession in his own right, and not those which he was compellable to pursue in

a representative character. The administrator of the wife, therefore, is the proper person to bring this action; and when the property is recovered, it will be liable, as before, to the legal claims against the wife, and the residue belongs to the representatives of the husband as her next of kin.

NOTE.—See the case brought by the administrator of the wife against the same defendant, 2 Hay. Rep., 183, and the cases referred to in the second note thereto.

WILLIAM ALSTON v. BULLOCK, et al., Bail of Searcy.—Page 77.

Where costs, which accrued after judgment, were not set forth in the *sci. fa.* against the bail, *it was held* to be no variance, on the plea of *nul tiel record.*

This was a Scire Facias brought by the plaintiff William Alston vs. the defendants, in Hillsborough Superior Court of Law, as bail of Reuben Searcy, to which the defendants, amongst other things, pleaded "Nul tiel record." The question made was, whether the omission of 2s 8d, charged on the ca. sa. vs. the principal, was such a variance between the judgment and the scire facias as would sustain the plea of "Nul tiel record."

By the Court. There is no failure of record in this case. The judgment and costs correspond; a variance arises from an omission of a charge for the seal, which is contained in the first list of endorsed fees; but that forms no necessary part of the record, and is not included in the judgment of the Court.

DEN ON DEM. OF JOSEPH CUNNINGHAM v. NICHOLAS MICHAEL.—Page 77.

All lands, the legal title to which remained in Henry Eustace M'Culloch on the 4th of July, 1776, were confiscated and the legal title thereof vested in the State.

The following case agreed by the counsel of the parties: On the 8th day of December, in the year of our Lord, 1772, Henry Eustace M'Culloch, sold for and in consideration of the sum of ———— pounds, three hundred and thirty-one acres of land, being the land in question, to Frederick Michael, father of the defendant; that said M'Culloch executed a bond to said Michael, at the time of the said sale, in the words following, to-wit: "Know all men by these presents, that I, Henry Eustace M'Culloch, of the province of North Carolina, bind and oblige myself to Frederick Michael of Rowan county, in the penal sum of four hundred pounds, proclamation money: conditioned to be void on my making him, or such person as he shall direct, in writing, a good and sufficient deed, right and title forever, to three hundred and thirty-one acres of land lying on both sides of Swearing Creek, as the same was surveyed the 11th day of November last, on the payment of a certain bond given by the said Michael to the said Henry Eustace M'Culloch, and bearing even date herewith;" that the said Frederick Michael entered upon and took possession of the land aforesaid, and continued in possession of the same until his death; and that the defendant hath been in possession ever since; that there was paid to the said H. E. M'Culloch, by said Frederick Michael £12 on the 23d day of December, 1772; that there was paid to Thomas Tronhock, Attorney in fact for said M'Culloch, £11 18s by said Frederick Michael, on the 4th of February, 1773; and that these payments were made in part discharge of said bond

given by said Michael to said M'Culloch, for the aforesaid land; that the lands aforesaid were sold by the Commissioner of confiscated property, and purchased by the plaintiff, who hath obtained a grant from the State for the same dated the 8th day of November, 1784, and that suit was brought by the plaintiff in May, 1791, and that all the lands, tenements and hereditaments of said Henry Eustace M'Culloch, and every right, title and interest which he had to lands in the State of North Carolina, on the 4th day of July, 1776, were confiscated, forfeited, and vested in the said State, and that the said lands were sold upon the ground of the right to the same being in said H. E. M'Culloch, on the said 4th day of July, 1776; and it is further agreed that at the time the plaintiff purchased said land of said Commissioner he knew that said Michael had purchased said land in manner before mentioned from said H. E. M'Culloch.

W. L. Alexander, attorney for plaintiff.
Archibald Henderson, attorney for defendant.

By the Court. The legal title of this land was unquestionably in M'Culloch on the 4th July, 1776, Michael having only an equitable right, in the assertion of which a Court of Equity would have aided him upon his paying the purchase money. It was therefore rightfully the subject of confiscation as the property of M'Culloch, and was accordingly confiscated and vested in the State, from whom the plaintiff derives his title. The extent of the defendant's claim upon the justice of the State, or how far a Court of Equity would interfere against the present plaintiff, on the ground of notice, it is neither necessary nor proper that we should decide, upon the present occasion.

WILLIAM WOFFORD, to the use of Charles McDowell v. JAMES GREENLEE.—Page 79.

Where a party cannot sue in his own name on a note, having but an equitable interest therein, he cannot except under special circumstances, avail himself of it by way of set-off.

This was an action on the case brought in Morgan Superior Court of Law on a note in the words following:

I promise to pay, or cause to be paid unto William Wofford, Esq., or to his assigns, the full and just quantity of six hundred gallons of good whiskey, on or before the 15th day of June, which shall happen in 1792, to be delivered at the subscriber's still house in Burke County, it being for value received of him this 1st day of November, A. D. 1790.

Signed, JAMES GREENLEE.

On the said note there was the following endorsement:

I hereby assign over my right of the within note to Chas. M'Dowell, this 30th July, 1791.

Signed, WILLIAM WOFFORD.

On this note there was a verdict for the plaintiff, subject to the opinion of the court, whether the following notes offered on the trial as a set-off, should be admitted as such:

I promise to pay or cause to be paid to Mr. John Cooper or order, the sum of eight pounds specie, to be discharged in any merchantable produce at the common prices, upon the 25th of December next, being for value received. Witness my hand this 24th July, 1784.

Signed, WILLIAM WOFFORD.

On which note there was the following endorsement:

I assign over my right, title and interest of the within note of hand to James Greenlee, for value received of him this 10th day of August, 1784.

Signed, JOHN COOPER.

I promise to pay, or cause to be paid to Mr. James Lee, or order, the sum of ten pounds current money of the State of North Carolina, on or upon the first day of June next ensuing the date thereof, but may be paid or discharged in any merchantable produce, or common trade, at the common custom or selling prices, being for value received. Witness my hand, this 3d March, 1788.

Signed, WM. WOFFORD.

On which there was the following endorsement:

I hereby assign over my right of the within note to James Greenlee, for value received of him, this 7th March, 1788.

Signed, JAMES LEE.

By the Court. The two notes upon which this question arises, not being payable in money alone, are not negotiable under the act; the endorsement, therefore, would not enable the defendant to sue for them in his own name; nor, for the same reason, to set them off. But for the purpose of shewing that they form the proper subject of a set-off, that class of cases has been referred to, wherein Courts of law have taken notice of an equity and a trust, and have given effect to the claims of a person beneficially interested, though no party to the record. Without tracing particularly these cases, which are often recurred to, it is sufficient to observe, that whenever the principle which governs them, has been acted upon, it was because the justice of the case manifestly required it; and for the purpose of giving that decision according to the merits in the first instance, which a Court of Equity would ultimately have pronounced, though with greater delay and expense to the parties. These authorities have guided many decisions in our own courts, and must continue to have a just influence upon cases where the same or similar circumstances justify their application.—There are, however, two circumstances in this cause which render it improper that the defendant should be considered as the owner of the notes, for the purpose of admitting them as sets-off. One is, that the note upon which the suit is brought, though not negotiable, is assigned to M'Dowell,

for whose use the money is to be received. This appears on the face of the proceedings: and if we regard the assignment of these notes as vesting the property of them in the defendant, equal justice requires that the assignment to M'Dowell should be also considered as vesting the other note in him! Then the set-off would not be against a claim of Wofford, but of M'Dowell, and of course mutuality, its essential principle, is wanting. Greenlee's equitable interest ought only to be taken into consideration by the court, for the purpose of lessening the demand of Wofford, the real debtor upon the notes; but to give it the effect of lessening the demand of M'Dowell, who is as well entitled to the whole amount, as Greenlee is to the set-off, would be to pervert the principle of the cases referred to. It is rather singular that Greenlee having these two notes, (as it appears by the date of the endorsement,) should have given the notes sued for to Wofford, without deducting the amount of them.

NOTE.—See *Stanly* v. *Green*, 1 Martin's Rep., 60, and the note thereto.

JOHN WALKER v. BERNARD & JOHNSTON.—Page 82.

If a tenant in common recover a judgment against his co-tenant, and direct the execution to be levied on a particular part of the tenant, he is estopped to claim a partition against the purchaser.

This cause came before the judges on the following statement, agreed upon by the counsel of the parties: John Walker and Daniel Bernard were seized on the 23d October, 1783, as joint tenants, and by the operation of the act of 1784, became tenants in common, in fee simple, of four lots and one-half in the town of Wilmington, described by the numbers 227, 226, 231, 232 and 236, and upon the petition of the said John Walker, for a partition of the said lots, the following special verdict was found in the County Court of New Hanover, March, 1799:

"The jury being impanelled and charged with this cause, find the following facts: That Daniel Bernard and the plaintiff, Walker, were possessed of the several lots mentioned in the petition, under a conveyance made by Solomon Ogden, dated 25th October, 1783, referring thereto; that the petitioner, Walker, obtained a judgment and execution against Daniel Bernard; that on the sale made in pursuance of said execution to satisfy said judgment, the petitioner, Walker, directed the sheriff to sell the lot No. 231, mentioned in the defendant's answer; that the said petitioner, Walker, was present at the sale of said lot, No. 231, and that the same was then purchased by the defendant, Johnston, and was conveyed to him, the said Johnston, by the sheriff of New Hanover county, for a valuable consideration, and that the defendant, Johnston, became possessed of said lot in pursuance of said sale."

Upon which special verdict the County Court pronounced judgment in favor of the defendant Johnston, against the prayer of the petition, from which the plaintiff appealed.

The question is, whether the facts and proceedings found by the above verdict to have been done by John Walker, amounts to a severance or partition of the interests of the said tenants in common?

By the Court. The only privity by which tenants in common are united is that of possession, and even this proceeds from the imposibility of each tenant ascertaining which is his own part; when the respective severalties can be ascertained, the tenancy is dissolved. A deed is not necessary in all cases to make partition between them; for it may be done by parol, if done upon the land, this amounting to a livery in law, and is in its nature as well calculated to give notoriety to the transaction as if the parties had entered into a deed. If there be any case wherein a partition is good by parol, the circumstances stated in this special verdict, are such as would have warranted a jury to infer the existence of whatever was necessary to complete it, and as a matter of evidence, the partition might have safely been presumed. And although the facts found may not

amount to a legal partition, since the court cannot supply any conclusions of facts; yet they are such as plainly estop the petitioner from a division of the lot in question. The judgment obtained by him, the sale of this lot, by his direction and in his presence, and the receipt of his debt out of the produce, amount to a strong assurance to the purchaser, that it was the separate property of Bernard; and he had reason to feel himself safe in going on to improve the property, and render it more valuable. The petitioner is therefore debarred by these acts, from claiming any benefit from the lot; for could it be even supposed that no severance had ever taken place, notwithstanding these indications of it, proceeding from a person to whom it must have been known, yet the circumstance of his standing by and concealing his title, or rather disclaiming any title by ordering the sale, are alone sufficient to authorize the court to pronounce a judgment for the defendants. In this case the sheriff and Walker may be considered as tenants in common, who mutually consented to a partition in the premises.

NOTE.—Tenants in common of lands cannot make partition by parol.—*Anders* v. *Anders*, 2 Dev. Rep., 529; *McPherson* v. *Sequine*, 3 Dev. Rep., 153.

HARRIS, BRALEY & CO. v. WILLIAM LENOIR, et al.—Page 85.

If the same jury attend on the premises in ten different *caveats* for different claims to different parcels of land, the caveators in all the cases being the same, but the defendants different, the jurors shall receive pay in each case.

This case came before the Judges upon the following statement made and signed by the counsel for the parties in the several suits depending in Morgan Superior Court:

"There were ten several caveats for different claims to different parcels of land in the county of Wilkes: the caveators in all were the same persons; but the defendants were different in each; all were tried by a jury on the premises;

in all of them the jury consisted of the same men, and they were three days in trying all the caveats on the several parcels of lands."

The question for the opinion of the court, is, Is each juror entitled to one day's pay, i. e., 8s. as a juror, in each of the ten caveats, amounting together for each to £4 2s., or is each of such jurors entitled only to be paid for three days' attendance as a satisfaction in and for the whole of such ten caveats, amounting to £1 4s. each ?

Evan Alexander, for plaintiff.
John Williams, for defendant.

By the Court. The act regulating the attendance of juries upon the premises, gives no direction to the court with respect to apportioning their pay; and without a latitude of that kind, it is impossible not to follow the obvious construction of the law. The allowance of eight shillings per day, is made to them in each case, without reference to the portion of time less than a day, they may be employed in the duty; and hence, if they perform the service in one hour, they would be entitled to the same allowance. And perhaps they would be justly entitled, unless it could be considered, that the value of the service was lessened by being quickly dispatched, or enhanced by occupying more time; or unless where juries are called from their private affairs, upon a duty of this kind, a line could be drawn between the inconvenience sustained by those who complete the business in part of the day, and that felt by those who were employed throughout the day. As they are entitled to this allowance in one case, the same expressions give them the same claim in every other; and as the services have been rendered in ten cases, and for different parties, on one side, each party liable to the costs, is bound to pay the jurors at the rate laid down in the act. We are not apprised of any rule by which a different allowance could be made, consistent with the provisions of the law, which are alone to guide us. The juries when summoned are bound to attend in every case, and a failure in this respect subjects them to forfeiture, and an action by each party grieved.

MARK POWELL v. ANDREW HAMPTON.—Page 86.

The attachment law does not require the plaintiff to swear positively to the amount of his debt; therefore it was held good where the plaintiff swore that he had good reason to believe that the defendant and his connections "had endamaged him to the amount of" a certain sum.

Where an attachment was executed and returned to a court on the same day on which it was issued, the return is irregular, but is helped by the statute of jeofail, after verdict or judgment by default.

It is not error for the court to order goods attached to remain in the hands of the sheriff of the county, such sheriff being the plaintiff in the suit.

If a plaintiff in attachment fail to give bond or file an affidavit, it should be pleaded in abatement; it cannot be taken advantage of by writ of error.

It is not error that the sheriff who summoned the jury to execute a writ of enquiry in an attachment was the party plaintiff in the cause.

If an officer executing an attachment returns "executed and returned" without specifying on what he has levied, the return is informal, but is cured by the statutes of jeofail, after verdict or judgment by default.

It cannot be taken advantage of by writ of error that no declaration or other paper setting forth the nature of the charge was filed in a suit by attachment.

This was a writ of error brought in Morgan Superior Court, to reverse a judgment obtained by the defendant in error vs. the plaintiff in Rutherford County Court by original attachment in the words following:

State of North Carolina, }
Rutherford county. }

To any regular Officer of Rutherford County, *greeting:* Seal, JONATHAN HAMPTON.

"Whereas Andrew Hampton hath complained on oath to me, a Justice of the Peace for said county, that he hath good reason to believe that Mark Powell, late of said county, and his connections, have endamaged him to the amount of, &c.," the rest in the common form. At October Term, 1782, the attachment was returned, "executed July 12, 1782, by me Henry Trout, Constable;" and at the same term, it was ordered by the court, that the goods attached

remain in the hands of the sheriff, and that he take proper measures to secure the same, till the event of the suit be known; and judgment by default was entered. At January court, in 1785, a jury was impanelled and sworn to enquire of the plaintiff's damages sustained, &c., who assessed his damages to £129 2s. and costs, and upon this judgment was entered and an execution issued, under which the property attached was sold. The following are the assignments of error:

1. That the suit was instituted by original attachment, and the plaintiff therein hath not sworn positively to any debt or damage due or done by him the said Mark, but that said plaintiff had good reasons to believe that said Mark and his connections had endamaged him, &c.

2. That the said attachment was executed and returned by a constable to July sessions, 1782, viz., the 12th of July, being the same day on which the said process was dated and granted by Jonathan Hampton, Esq.

3. That it was then ordered by the court that the goods attached remain in the hands of the sheriff until the event of the suit, and that the said plaintiff was then sheriff of the county of Rutherford, to whom said order was directed.

4. That the plaintiff did not give bond to prosecute his suit, nor did make and sign affidavits of the facts set forth therein according to law, and return the same.

5. That the plaintiff, Andrew Hampton, being the sheriff of said county, did summon the jury to execute a writ of enquiry on said suit, and did as sheriff preside at the trial.

6. That Henry Trout, the constable who executed said attachment, hath not returned on what lands or goods the same was levied, but barely endorsed "executed and returned."

7. That no declaration or any other paper setting forth the nature of the charge was filed, and therefore the said Mark Powell for these reasons prays that the said judgment may be annulled and reversed.

The question is, are the foregoing matters assigned for

error, or any of them, sufficient to reverse the judgment obtained in the County Court?

By the Court. We have considered the exceptions taken to this record, and shall briefly state, in the order of assignment, the reasons which lead us to conclude that this judgment ought not to be reversed.

1st error. The act of Assembly upon this subject, Iredell, page 301, does not require that the party obtaining an attachment, shall swear positively to the amount of his debt or damage. It is sufficient that he swears to the best of his knowledge and belief, and the oath taken in the present case does not substantially differ from that required by the act. Had it varied from the effective meaning of the act, it must have been considered as no oath at all, and then the defendant might have availed himself of it by plea in abatement, and wherever an exception may be so taken, it cannot be assigned as error. The act has at once prescribed the form of proceeding, and directed the manner in which any omission shall be taken advantage of by the defendant. If, therefore, this be an error, it would be wrong to reverse a judgment long since rendered, where the defendant might, in the first instance, have abated the writ.

2. We conceive that this irregular return is helped by the two statutes of Jeoffail, 18th Eliz., ch. 14, and 4 and 5 Ann., ch. 16, the first of which provides that judgment shall not be stayed or arrested by reason of any imperfect or insufficient return of any sheriff or other officer, and by the latter act the same practice is extended to judgment by default.

3. This is altogether a collateral matter, no way essential to the gist of the action, nor in any respect connected with the regularity of the judgment. But it does not appear on the face of the record, that the defendant in error was the sheriff of the county when this order was made, and presumption, if made at all, should be rather to support than destroy a judgment. The order itself likewise is merely surplusage. It is directory on the sheriff to do that which the law has already enjoined upon him, for it may fairly be

interpreted, that he either keep the goods in his custody, or deliver them upon being replevied. Let this exception, however, have its greatest force, and we think it comes completely within the spirit and meaning of the statutes of the 16th and 17th Car. 2d ch. and 4 and 5 Ann, ch. 16.

4. This should have been pleaded in abatement.

5. Admitting that this appeared upon the record, which it does not, yet it is to be considered that the jurors are appointed by the court, and the sheriff possesses no other power than merely as a minister to summon them to attend. —Even in England, where the mode of appointing juries is extremely different, this objection could only form a cause of challenge to the array, and if omitted to be so taken, could not be assigned for error. Challenges might also have been made on the same ground, had the inquest been formed of talesmen; but to presume that they were so formed, would be to make an error where none appears.

6. The return is certainly informal, but is cured by the statutes before referred to.

7. If there be any weight in this objection, as applied to original attachments, we think that under the circumstances of this case, it cannot be taken advantage of in error.

NOTE.—See *Bickerstaff* v. *Dellinger*, post, 299. *State Bank* v. *Hinton*, 1 Dev. Rep., 397. *Skinner* v. *Moore*, 2 Dev. & Bat., 138. *Garmon* v. *Barringer*, Ibid., 502. *Minga* v. *Zollicoffer*, 1 Iredell's Rep. 278.

THE SURVIVING PARTNERS OF ALSTON, YOUNG & CO. v. BRESSIE PARISH'S HEIRS.—Page 91.

A default should not be set aside the third term after it was taken nor without imposing on the defendant the usual terms of entering only such pleas as will bring forward the merits of the case.

This was an action of debt brought upon a bond executed by the father of the defendants, in his lifetime to

the plaintiffs. The writ was executed and returned to May Sessions of Granville county, 1799; the defendants made no defense—a judgment by default was taken—at August court the cause was continued; and at November Term the defendants moved the Court to set the judgment by default aside, and for leave to plead such pleas as they might think proper, intending to plead the act of 1715, "barring all claims against the estates of deceased persons, after the expiration of seven years from the death of the debtor." The County Court set the judgment by default aside, without restricting the defendants in pleading. From this decision the plaintiffs appealed to Hillsborough Superior Court of Law, and after argument, the question was submitted to the Judges here.

By the Court. The default in this case, was taken in a manner to the two rules of practice established by the court law, and is therefore unexceptionable in point of regularity. The discretion residing in the Court to set aside such judgments, ought to be exercised with a view to the attainment of justice, and the prevention of delay under the particular circumstances of each case. It is necessary not only that the application should be made within a reasonable time, but the merits likewise which the defendant seeks to have tried, ought to be clearly and concisely stated in an affidavit. It follows that this default was improperly set aside, because done at the third term after it was duly taken, and without imposing on the defendant the usual terms of entering a plea which should bring forward the merits of the cause.

NOTE—See *Andrews* v. *Devane*, 2 Hay. Rep., 373, and the cases referred to in the note.

HUGH COOMER v. WILLIAM LITTLE.—Page 92.

Where the commissioner appointed to settle the army accounts issued a certificate in the plaintiff's favour upon which the defendant drew the money, *it was held* that the plaintiff's cause of action thus accrued, and that a lapse of three years thereafter would bar him.

This was an action on the case instituted originally in the County Court of Orange, to recover the sum of 81 dols. 30cts., being the value of a certificate issued in favour of the plaintiff, by Robert Fenner, Commissioner appointed in 1786, to settle the army accounts, and drawn by the defendant. Pleas, general issue, statute of *limitations*. The plaintiff had a verdict subject to the opinion of the Superior Court of Law for Hillsborough District, whether in an action brought to recover the value of a certificate drawn more than three years before the bringing of the suit, the statute of limitations would operate to bar the plaintiff's demand.

By the Court. Nothing appears in this case, to take it out of the general principle, that the statute of limitations begins to run from the time the plaintiff has cause of action against the defendant. In the year 1786, the defendant received the money to the use of the plaintiff, who might then have instituted a suit, and consequently in three years from that time, the pleading the statute would bar his recovery.

NOTE.—See *Sweat* v. *Arrington*, 2 Hay. Rep., 129.

THE STATE v. JOHN COLE, Sheriff.—Page 93.

Where taxes were due on the land for two years, and the Sheriff sold the land for the taxes of the first year for a sum sufficient to pay the taxes of that year, but not those of the last year; *held* that the land in the hands of the purchaser was not liable for the taxes of the last year.

David Allison, residing in Philadelphia, was seized of a tract of land containing —— acres, lying in the county of Richmond. This tract was duly returned by Allison or his agents in the tax list for the year 1795, but not for the year 1796,: neither the taxes for 1795 or 1796 were paid; and the defendant, in consequence thereof, after the 1st day of April, 1796, advertised the land for sale for the payment of the taxes for the year 1795, and on the 23d of September, 1796, sold the same for £175, which was a small sum more than sufficient to pay the taxes for 1795, but not sufficient to pay those due for 1796. Afterwards, the defendant, sheriff as aforesaid, demands the tax due for 1796 from the purchasers under the sale, but they refuse to pay it, and the defendant is sued by the treasurer for these taxes. It is agreed that if the lands in the hands of the purchasers under said sale, they being now in possession, are not liable, the sheriff is not. The question is, are they liable or not?

By the Court. Those lands in the hands of the purchaser, were not liable for the taxes for the year 1796.

ELIAS COLKINGS, ADM'RS v. THE SURVIVING PARTNER OF JAMES THACKSTON & CO.—Page 93.

A reference to arbitrators will take a case out of the statute of limitations.

This was an action on the case brought in Fayetteville Superior Court of Law, pleas, general issue, statute limitations. The jury sworn find the defendant did assume and assess the plaintiff's damages to £76 8 2, subject to the opinion of the court on the following points: In July Term, 1792, two actions were depending in the County Court of Cumberland, between John Burgwin, surviving partner of James Thackston & Co., against the present plaintiffs. The plea of set-off was pleaded, and the death of James Thackston was suggested at that term, and an order was made referring both causes to John Eccles and John Winslow, as by the records of the county court will appear, and which are to be considered as part of this case; that on the 10th day of October, 1792, the said referees made their award as follows: "We, the subscribers, appointed referees in the suits depending in the county court of Cumberland, between the surviving partners of James Thackston & Co. and the administrators of Elias Colkings, having examined the several accounts between the parties, and taken the testimony of Lewis Barge, John Baker, and Archibald M'Mullan find a balance due the estate of Elias Colkings, as above stated.

Fayetteville, Oct. 10, 1792.

Signed JOHN ECCLES,
JOHN WINSLOW.

That the award was returned to the county court, and at January Term, 1793, of said court, judgment was given thereon in both suits for the defendants, the administrators of Elias Colkings, that this action was brought within three years after the reference aforesaid. If the court should be of opinion, that the above reference, award and

judgment, are sufficient to take the cause of action out of the statute of limitations; or if the plaintiff in this action can maintain it on the references and submissions aforesaid, then and in either of those cases, judgment is to be given for the plaintiff on the verdict. But if the court shall be of opinion that this action cannot be maintained either way, then judgment of nonsuit to be entered.

By the Court. The plaintiffs and the defendants having agreed to refer the matters in dispute between them to arbitrators takes the case out of the statute of limitations, and the present suit having been brought within three years after the reference had been entered into and made a rule of court, the present plaintiffs are entitled to recover in this suit.

JAMES M'ALISTER'S ADM'RS v. JAMES SPILLER'S EX'RS.—Page 95.

An action for seducing away a slave does not abate by the death of the defendant.

The plaintiff's intestate possessed and was legally entitled to the service of a negro named King by hire, for the space of one year, commencing the 1st of Jan., 1795, and ending the 1st of Jan., 1796. James Spiller, the defendant's testator, in the year 1795, seduced, enticed and persuaded the said negro King, to absent himself from the service of the said James M'Allister, and did maintain and keep the said negro King in his possession during the remainder of the year. The jury find the defendant's testator guilty, and assess the plaintiff's damages to £——; the suit was commenced against Spiller in his lifetime, and duly revived against his executors, and against whom said verdict was had.

The questions are—Whether such suit was abated by the

death of James Spiller, so that it could not be revived against his executors; and whether, as said suit was revived without any plea in abatement, judgment shall now be rendered against the said executors?

By the Court. This action having been brought for the seduction of a slave from his master's service, and the defendant's testator keeping the slave in his possession to the injury of the plaintiffs, the action did not abate on the death of James Spiller, and after his death was properly prosecuted by the plaintiffs.

GILBERT M'CALLOP'S EX'RS v. WARREN BLOUNT and Wife.—Page 96.

Slaves, to whom the wife has a right in remainder, do not vest in the husband, if he die during the coverture, without having reduced them into possession.

The following case stated by the counsel for the parties to this suit, brought in Wilmington Superior Court. John Moore, by his last will and testament, bequeathed sundry negroes, in the following words, to-wit:

"It is my desire that the following negroes, to-wit: Cæsar, Tom, Nan, Dorcas, Doll, and Davy, and all their issue, if any, should remain with my beloved wife, Mary, during her widowhood, to raise her children upon; and after her intermarriage, to be equally divided amongst my beloved daughters, Annis, Mary, &c."

John Moore died; and his widow took possession of the negroes, agreeably to the will. During her widowhood, Annis, one of her daughters, intermarried with Gilbert M'Callop, who soon after died, during the widowhood of John Moore's wife. In a short time after the death of Gilbert M'Callop, John Moore's widow intermarried with

a certain Mr. Bulls; in consequence of which a division of the negroes above mentioned, was made amongst the daughters of John Moore, according to his will, and the part allotted to Annis, the widow of Gilbert M'Callop, was given to her, and she intermarried with the defendant Warren Blount.

The widow of John Moore had possession of all the above named negroes, from the time of John Moore's death to her intermarriage with Bulls. Gilbert M'Callop never had possession of any of them during his life. The executors of Gilbert M'Callop have brought suit against Warren Blount and wife, and the question is, do the negroes allotted off to Annis, the wife of Warren Blount, belong to them, or to the executors of Gilbert M'Callop?

By the Court. By the devise in the will, the negroes in question were to remain in the possession of the widow of John Moore during her widowhood, and on her marriage were to be equally divided between his two daughters, Annis, Mary, &c. Annis intermarried with Gilbert M'Callop, during the widowhood of Jno. Moore's wife, and Gilbert M'Callop during her widowhood. Neither Annis nor her husband were entitled to the possession of the negroes until the marriage of John Moore's widow. As Gilbert was not, nor could have possession of the said negroes during his life, his executors cannot have them after his death. They belong to Annis and her husband, the present defendants. 2 Bl., 433. 1 Bacon, 289.

NOTE.—See *Neale* v. *Haddock*, 2 Hay. Rep., 471, and the cases referred to in the second note thereto.

AUGUSTUS BENTON v. WILLIAM DUFFY, Bail for Green.—Page 98.

It is only where the question between the parties has once been decided upon confession or verdict, that the judgment can be pleaded in bar to another action: Therefore where a plea of *nul tiel record* to a *sci. fa.* reciting a judgment against James H. Green was found for the defendant because the judgment was against James Green, *it was held* not to be a bar to a *sci. fa.* reciting a judgment against James Green.

The county to which the *ca. sa.* against the principal should issue, in order to charge the bail, is the county in which the defendant was arrested, unless the return of the sheriff or something equally satisfactory and conclusive evinces that the county, where the defendant was taken, no longer continues to be his proper county.

The plaintiff obtained a judgment in the County Court of Orange vs. James Green, for whom the defendant in this suit was bail; a writ of fi. fa. issued, and a small part of the demand was satisfied; for the balance a writ of ca. sa., issued to the county of Orange, to which the sheriff returned "not to be found:" before the ca. sa. issued to Orange, the defendant informed the plaintiff, or his agent, that Green resided in the county of Edgcombe, and requested that the process might issue to that county; this was however refused, and when the defendant made his defense to the scire facias, grounded on the aforesaid return, he among other things, relied on this as proof of collusion to charge the bail. Judgment was given for the defendant upon the plea of nul tiel record to the first scire facias, because the scire facias, stated that the judgment had been recovered against one James H. Green, and the record was of a judgment against James Green.

A second writ of scire facias issued, and was returned "executed;" and the defendant pleaded "Nul tiel record, former judgment no ca. sa. to the principal's proper county, collusion to charge the bail, surrender of the principal, death of the principal, discharge of the bail by the election

of the plaintiff to sue out a fi. fa." The plaintiff replies, there is such a record, nul tiel record as to former judgment, as to the plea of ca. sa., &c. Plaintiff replies a ca. sa. to Orange, where James Green was resident at the time the writ was sued out against him, and he arrested, &c. Defendant rejoins, that at and before the time of issuing the ca. sa. to Orange, the principal resided in Edgecombe, and the plaintiff had notice thereof; demurrer to the rejoinder and joinder, replication and issue as to the pleas, collusion to charge the bail, surrender and death, &c., demurrer as to the plea of discharge of the bail by issuing fi. fa. and joinder. The county court gave judgment upon the several pleas and demurrers for the plaintiff; the defendant appealed to the Superior Court of Law for Hillsborough District, when he withdrew the pleas that the bail was discharged by the election of the plaintiff to sue out fi. fa., surrender of principal and death of principal; and a jury being impanelled, found that there was no collusion to charge the bail: Whereupon the court ordered that the plea of nul tiel record and the plea of former judgment, and replication thereto, and plea of no ca. sa., to the principal's proper county, the replication, rejoinder, demurrer and joinder thereon, be transmitted to the Court of Conference for a final determination.

By the Court. In the former suit, the plea of nul tiel record went only to the existence of the particular judgment recited in the writ, namely, against James H. Green, and the production of a judgment against James Green, was considered by the court a failure of record. The question whether the defendant became bail for James Green, whether a judgment was obtained against him, whether the subsequent steps were legally taken so as to charge the bail, were neither discussed nor decided on. And it is only where the question between the parties has been once decided upon confession or verdict, that the judgment can be pleaded to bar another action. Hence, if a party fails by reason of a defect in his declaration, or by misconceiving his action, or

by suing as executor when he was administrator, the judgment will be no bar in another action for the same cause.

The *ca. sa.* has in this case issued according to the act.

By the proper county, is meant that wherein the defendant was arrested, which the clerk can at once ascertain, by examining the writ, which serves as his guide in issuing the execution. This ought not to be departed from, unless a return of the sheriff, or something equally satisfactory and conclusive, evinces that the county where the defendant was taken, no longer continues to be his proper county.

NOTE.—See *Finley* v. *Smith*, 3 Dev. Rep., 247, which decides that the proper county, *prima facie*, to which a *ca. sa.* should issue, in order to charge the bail, is the county where original writ was executed. But if the defendant has acquired a *domicil* in another county and the plaintiff has notice of it, the *ca. sa.* ought to issue to that county.

WILLIAM G. BERRY and wife v. MARY McALLISTER'S EX'RS.—Page 100.

Where a tenant for life bequeathed one-half of the emblements to which she was entitled to her daughter and left an executor, who, after reaping and housing the crop, married the daughter, but died before he had sold or otherwise disposed of *it was held* that his possession of the crop was only as executor, and that upon his death, the wife and not his administrator was entitled to it.

This was a petition exhibited in Wilmington Superior Court, for a distributive share of the estate of Mary McAllister, and the following facts were agreed upon by the parties and their counsel:

1. That Archibald McAllister being seized of a plantation in Brunswick county, called Belleville, and possessed of sundry negroes who had been usually employed upon it, devised the plantation and negroes to his wife Mary McAllister for life, remainder to his brothers and sisters, of whom James McAllister was one, and died in the year 1793.

2. That after the death of Archibald, Mary, who was tenant for life, and James, who was one of the remainder-

men lived upon Belleville plantation, and made one family; but James had the superintendence and management of the plantation and negroes, and in the spring of 1794, planted the crop of rice in question.

3. That about the month of May, 1794, whilst the crop was growing, Mary died, leaving a daughter the petitioner Sarah Eliza, and a son, to whom she devised the residue of her estate equally, which residue included her share of said crop, and appointed James McAllister and Benjamin Mills, amongst others, her executors.

4. That upon the death of Mary, James proved her will, and alone qualified as executor, continued to superintend the crop in the same manner as he had done in the life-time of Mary, and when it was grown, reaped and stacked it.

5. That in the month of January, 1795, after the crop was reaped and housed, James married the petitioner Sarah Eliza, the daughter of Mary, to whom Mary had devised one-half of the residue of her estate as aforesaid.

6. That about the month of April or May, 1795, James McAllister made a contract with one William Prestman of South Carolina, for the sale and delivery of a large quantity of rice far exceeding the whole crop aforesaid, but no mention was made in said contract of the crop in question, nor was the crop ever delivered, nor during the life of James McAllister, threshed out, but remained at his death on Belleville plantation, in the same state and condition which it was in at the time it was reaped and stacked as aforesaid.

7. That James McAllister died about the month of September, 1795, leaving his wife Sarah Eliza, who is since married to the petitioner, William G. Berry, and upon the death of James, Benjamin Mills, one of the executors named in Mary's will, qualified, took possession of the crop which remained upon Belleville as aforesaid, caused it to be threshed out, and sold at public vendue as the property of Mary, and took bonds payable to himself as her executor.

Now the question submitted for the opinion of the court, is, whether that half of the crop which was devised as

aforesaid by Mary McAllister to her daughter Sarah Eliza, was, by the aforesaid acts of James McAllister, vested in him, so as to go to his administrator, or whether it survived to his widow?

By the Court. That part of the crop in question devised by Mary to her daughter Sarah Eliza, never vested in James so as to make it his property. He acted only as an executor of Archibald McAllister, and it does not appear that any act of his extended to taking possession of one-half of said crop as his own, and without such interference we must presume he acted as executor. 2 Blac., 433.

NOTE.—See *Dozier* v. *Sanderlin*, 1 Dev. & Bat. Rep., 246.

ISAAC DAVIS v. THOMAS GIBSON.—Page 102.

Assumpsit will not lie where a party has a remedy on a covenant under seal therefore where in a charter party under seal the defendant expressly covenanted to man and victual the vessel for the specific voyage and back again, &c., and afterwards sold her in a foreign port and received the money, *it was held*, that as the whole tenor of the contract shewed that it was the intent of the parties that the vessel should return, it was a breach of the charter party for the defendant to sell, for which the plaintiff could bring covenant or debt, which was a higher remedy than assumpsit.

On an appeal from the county to the Superior Court, the plaintiff shall not change the declaration filed in the County Court; and if there was no written declaration, he shall be confined to the grounds of action declared below.

The plaintiff instituted an action upon the case against the defendant in the year 1794, in the County Court of New Hanover, for the sum of £850. At March Term, 1797, of said court, the plaintiff moved to amend his writ, and alter it from *case* to *debt*, agreeably to the following copy of the minutes of said County Court: "In the suit *Isaac Davis* v. *Thomas Gibson*, the plaintiff moved for leave to alter the writ from case to debt, which was opposed by the defendant, and it was ordered on argument, by the court, that the plaintiff taking nothing by his motion; from which

decision said plaintiff prayed an appeal to the Superior Court, which was granted; and at —— term, 179– of said court, upon a motion for that purpose, the said court refused permission to alter the writ. At November Term, 1799, the plaintiff filed his declaration in case, for money had and received to the use of the plaintiff, to which the defendant pleaded the general issue; and at November Term, 1800, on the trial of the said cause, it appeared in evidence, and was proved, that the defendant had gone in the vessel mentioned in the charter party, to the West Indies, and sold her for 850 dollars, and received the money, but had paid it to the captain of said vessel, as the defendant declared, who, the defendant said was authorized to receive it, though it appeared in evidence, that the captain was put in the vessel as captain by the defendant: But the court ordered a nonsuit upon the ground that the plaintiff had originally issued his writ upon a sealed instrument, and ought not afterwards to alter the cause of action, which said sealed instrument is as follows:

North Carolina, sct.

"This charter party of affreightment, indented, made, concluded, and agreed upon this 2d day of January, A. D. 1794, and in the 18th year of American Independence, between Thomas Gibson, merchant of the Island of St. Bartholomew, of the one part, and Isaac Davis, pilot of the town of Wilmington, State aforesaid, on the other part, witnesseth, that the said Isaac Davis, for the consideration hereinafter mentioned, hath granted and to freight letten, and by these presents doth grant and to freight let unto the said Thomas Gibson, his heirs, executors, administrators and assigns, the whole of the schooner Rambler, of Wilmington, whereof he the said Isaac Davis is sole owner, to proceed from the port of Wilmington, as soon as possible, and to proceed to the Island of St. Eustatia, St. Bartholomew or St. Thomas's, which may be most convenient, the said Isaac Davis to deliver to the said Thomas Gibson, or

his assigns, the schooner Rambler, well apparreled and fit for sea, and the said Thomas Gibson to man and victual her for the said voyage, and back again to the port of Wilmington, and to pay to the said Isaac Davis the sum of one hundred Spanish milled dollars for the run to either of the said islands and back again, to him the said Isaac Davis, his heirs and assigns. And it is further covenanted and agreed upon, that the said schooner Rambler shall not be detained in any of the aforesaid islands, that is to say in her port of delivery, making a provision for Charterer's privilege of trying markets for the space of 24 hours, in any of the aforesaid islands, more than the space of eighteen days: In case of detention, said Gibson agrees to pay the sum of six dollars per diem, for every such day's detention. And the said Thomas Gibson doth also further agree to pay to Capt. Robert French, all balance of charter money as specified, and all such demurrage as arises aforesaid, on delivery of cargo in any of the above-mentioned islands. And he the said Gibson covenants, and by these presents agrees to indemnify said Isaac Davis from any penalty or loss which may incur by said vessel being employed in any contraband or illicit trade during the term of charter. And he the said Thos. Gibson doth covenant and further agree to well and sufficiently man and victual the said schooner Rambler for said voyage and back again to the port of Wilmington, and for the true performance of all and every the articles, covenants and agreements before mentioned, they the said Thomas Gibson and Isaac Davis do hereby bind themselves each party to the other in the sum of two hundred dollars, to be paid by either of the parties failing in the performance thereof, or his heirs, to the other party or his assigns. In witness whereof, the said parties have hereunto set their hands and seals, the day and year above written.

Signed, Isaac Davis, Seal.
Thomas Gibson, Seal.

N. B. We the parties above named do agree to have

the said schooner Rambler insured for six hundred dollars, to pay the insurance one-half each party.

Isaac Davis, Seal.
Thomas Gibson, Seal.

The questions are,

Whether it appears by the record produced and hereto annexed, that the action was founded on the said sealed instrument; if so, then whether the plaintiff can alter the declaration which he made in the County Court:

Or having made no declaration, can vary the real and true ground of his action.

And supposing that he will now be permitted to declare in case, whether he has not a better writ;

And whether the bail being now liable, he should be permitted to vary his original ground of action, so as to charge them.

By the Court. The true question for us to decide, is, whether the plaintiff might have maintained an action of covenant upon the charter party annexed to the record. For if that action would lie and furnish a complete remedy for the sale of the schooner, it follows that the action of assumpsit, without any express promise by the defendant, to pay the money to the plaintiff, after the sale of the vessel, but founded merely on the assumpsit raised by law, cannot be sustained. The defendant expressly covenants to man and victual the vessel for the specific voyage and back again to the port of Wilmington, and to pay a certain sum for the run to either of the islands mention, and back again.—Demurrage is to be paid if the vessel is detained in her port of delivery beyond a certain time, and the whole tenor of the contract shews that it was the intent of the parties, that the vessel should return to Wilmington. If then the defendant, instead of facilitating her return, as he was bound to do, hath altogether prevented it, by selling the vessel, such an act amounts to a breach of the charter party, which, like any other deed, must be construed according to the design of the makers. The plaintiff for this had an higher remedy

by action of covenant or debt, and upon this appearing, it was proper for the court to direct a nonsuit. The declaration filed in the County Court ought not to be changed on an appeal; and if the grounds of action are declared to the defendant, though without a written declaration, and the parties proceed to trial accordingly, the same grounds are understood to exist, and to form the basis of the action upon the trial of the appeal. It is unjust that the defendant, who has prepared himself for the trial in one form of action, should by the appeal be surprised with another, and totally different action to which his defense may be altogether inadequate. It is equally so, that the plaintiff, after hearing his adversary's defense and evidence, should be allowed to alter and mould his action so as to avoid its force and direction.

NOTE.—See on the first point *Wilson* v. *Murphey*, 3 Dev. Rep., 352; and on the second, *Downey* v. *Young*, 1 Dev. Rep., 432.

ARTHUR WALLER v. SAMUEL PITTMAN, et al.—Page 107.

The sureties in an appeal bond cannot be charged, if the condition of the bond leave out the most effective part required by law, to-wit, that the sureties should be discharged on the performance by the appellant of the judgment in the court above.

This was a *scire facias* brought in Halifax Superior Court of Law, to compel the defendants to pay a sum of money recovered by the plaintiff against Benjamin Waller, whose securities the defendants were, on an appeal taken from the County to the Superior Court, plea "nul tiel record;" the bond produced in the following words: "State of North Carolina. Know all men by these presents, that We, Benjamin Waller, Samuel Pittman, and James Slotter, are held and firmly bound unto Arthur Waller, in the full sum of one

hundred and sixty pounds, to the which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this twenty-third day of May, A. D. 1792.

"The condition of the above obligation is such, that if the above bounden Benjamin Waller shall well and truly prosecute an appeal taken by him this day from the judgment of the County Court of Halifax, passed against him in favour of Arthur Waller, to the Superior Court of Halifax District, and if the decree is confirmed; or if the said Benjamin Waller shall fail to prosecute the said appeal, the said Benjamin Waller shall well and truly pay to the said Arthur Waller, *twelve and an half per cent.* interest on the sum decreed, then the obligation to be void; else to remain in full force and virtue.

Signed, BEN. WALLER, Seal.
SAML. PITTMAN, Seal.
Witness, JAMES SLOTTER, Seal.
L. LONG, Clerk."

By the Court. This is an appeal taken under the directions of an act of Assembly, prescribing the manner in which such bonds shall be taken, and directing the mode of prosecuting the appeals. The defendant ought not to be charged by virtue of such a bond, unless the provisions of the act have been substantially pursued; nor is it right to make any intendment against sureties, beyond that which they have stipulated to perform. The act of 1777 requires that the appellant shall enter into bond with two sufficient securities for prosecuting the appeal with effect, and for performing the judgment, sentence or decree which the Superior Court shall pass or make therein, in case such appellant shall have the cause decided against him. By the act of 1784, it is provided that when the judgment shall be affirmed in the Superior Court, or the appellant shall discontinue his appeal, then he shall pay to the plaintiff in the original action, at the rate of six per cent.; and this is directed to be

inserted in the condition of the bond. This is increased to 12½ cent. by the act of 1785, which is to be paid where the appeal is not prosecuted, or where the Court affirm the judgment. From these several acts, which are all that relate to the subject, and which therefore should be taken together, it is apparent that the most effective part of the condition is left out of this bond. So that were the securities able to prove that the appellant had performed the judgment of the Superior Court, it would not save the penalty. Though in ordinary cases the circumstance of the condition of a bond being insensible and repugnant, operates only to avoid the condition, and still leaves the bond single, and binding upon the obligor, yet that principle is not applicable to this case. There it is said to be the folly of the obligor to enter into such a bond from which he can never be released, yet here they must have supposed they were entering into a legal bond.

NOTE.—See *Forsyth* v. *McCormick*, 2 Car. Law. Repos., 472; *Orr* v. *McBride*, 3 Murph. Rep., 235.

JOHN BRICKELL'S EX'RS. v. WILLIAM BATCHELOR.—Page 109.

Covenant will not lie on the assignment under seal of a bond for the payment or delivery of tobacco, the breach assigned being that the obligor did not deliver the tobacco.

This was an action of covenant brought in Halifax Superior Court, and the following verdict found by the consent of the parties. The jury find the covenant in the following words: "I promise to pay Jesse Bowers or his assigns, six thousand weight of good tobacco by March next, for value received. Witness my hand and seal, this 10th October, 1781.

Signed, HARRISON MACON, Seal."

On which they find the following endorsements:

"I endorse the within to William Batchelor, as witness my hand and seal, this 22d October, 1782.

Signed, J. HICKS, Seal."

"I enclose the within to John Brickell, witness my hand and seal, this 22d October, 1782.

Signed, W. BATCHELOR, Seal."

And it is submitted to the court, whether an action of covenant will lie on the above endorsement of Wm. Batchelor, for the damages sustained by the non-performance of the covenant of the said Harrison Macon.

By the Court. MACAY and JOHNSTON, J., were of opinion, that this action could not be sustained.

ANTHONY HUTCHINS v. HECTOR McLEAN.—Page 110.

In detinue, where no value is laid in the writ of the property sued for, the defendant should demur; he cannot after a verdict finding the value, move it in arrest of judgment.

This was an action of detinue brought in Fayetteville Superior Court, and the writ was "to answer Anthony Hutchins, of a plea that he render to him the following negro slaves, to-wit: a female slave named Milly, and her three children, to-wit: Creecy or Lucretia, Simon and Lettice, which he unjustly detains, to his damage of five hundred pounds." The plaintiff had a verdict in which the value of each slave was found; and the defendant's counsel moved in arrest of judgment, that no price or value is laid for the negroes named in the writ as being detained.

By the Court. The reasons in arrest of judgment cannot avail the defendant. He ought to have demurred for the cause assigned in his reasons in arrest of judgment, but hav-

ing pleaded an issuable plea, and that being found against him, it is too late after the verdict, to take the exceptions. This defect being excused by the several acts of the General Assembly, for the amendment of the law.

JAMES SUMNER et al. v. WILLIAM BARKSDALE and wife.—Page 111.

Acts of Assembly take effect from the beginning of the session in which they are passed.

This was a petition exhibited in Halifax Superior Court, to obtain partition of sundry tracts of land, the petitioners stated they are the children and heirs-at-law of Josiah Sumner, dec., that William Sumner departed this life about the *seventh* day of May, 1784, an infant under the age of 21 years, seized and possessed of several tracts of land; that the said William left no child living at the time of his death, or any brother or sister, whereby a certain James Sumner, and Seth Sumner, and Josiah Sumner, the father of the petitioners, brothers of David Sumner, the father of the said William, become heirs at-law to the said William, and entitled to the lands by descent, agreeably to the Acts of Assembly, in such cases made and provided, as tenants in common; that the said Seth Sumner died without issue, that Josiah, the father of the petitioners, is also dead; and that James Sumner is also dead, and devised part of the land to Creecy, the wife of the defendant Barksdale, and the residue to his executors, for the payment of debts, and for other purposes.

The defendant demurred, because it appears from the petitioners' own shewing, that William Sumner in the petition mentioned, died on the 7th day of May, 1784, at which time, by the laws of this State then in force, the lands of the said William, dying an infant, must have

descended to the oldest brother of David, the father of the said William, and could not descend to all the brothers of the said David and their representatives.

The Act of the General Assembly, entitled "An Act to regulate the descent of real estates, to make provision for widows, and to prevent frauds in the execution of last wills and testaments," under which the petitioners claimed, was passed at a General Assembly begun and held at Hillsborough, on the 19th day of April, 1784, and was ratified the 2d day of June, 1784. And the question was, at what time the said act took effect, whether from the first day of the session, or from the day of the ratification.

By the Court. The only question in this case is, at what time the Act of the General Assembly, entitled "An act to regulate the descent of real estates, to make provision for widows, and to prevent frauds in the execution of last wills and testaments" shall take effect. This law was passed at a General Assembly, begun and held at Hillsborough on the 19th day of April, 1784, and was ratified on the 2d day of June, 1784. The rule established in Great Britain, is, that the statutes take effect from the first day of the sitting of the Parliament at which they were passed. The same rule has been held in this State with respect to what time our Acts of Assembly shall take place. It has appeared necessary that there should be some particular time stated and known when the Acts of the General Assembly should have effect, and the rule established in England, has been adopted in this State, and continued in use until the General Assembly passed the law in 1799, saying they should not have effect and be in force until thirty days after the rising of the General Assembly, unless otherwise expressed. William Sumner, under whom the complainants claim, died on the 17th day of May, 1784, intestate, without any child living, and without any brother or sister. Therefore, under the rule established at the time of his death, when the Acts of the General Assembly of this State are

to be in force, the complainants are entitled to the prayer of their petition.

NOTE.—See the act of 1799 (1 Rev. Stat., ch. 52, sec. 36) by which it is provided that Acts of Assembly shall only be in force from and after thirty days after the termination of the session in which they are passed, and not before, unless otherwise expressly directed in the acts themselves.

RICHARD MULLINGTON'S EX'RS. v. JAMES SHIPMAN.—Page 113.

If a testator bequeath a negro woman to A. and her future increase to B. and others, the children of the woman born after the death of the testator will go to the legatees B. and others.

This was an action of detinue brought in Wilmington Superior Court of Law, to recover a negro slave named Amy. Richard Mullington, on the 13th day of May, 1776, made and duly published his last will and testament in writing, and among other things devised as follows:

"I give and bequeath to my grand-daughter Lucy Lewis, 1 negro wench named Moll, that is to say, the said wench only, the children of her body to be disposed of or given, as hereafter mentioned or directed, the said wench to her, her husband or assigns forever.

"Item, I will and desire that the children, which shall or may be born of the aforesaid negro wench Moll, bequeathed to my grand-daughter Lucy Lewis, be delivered to the young children, according to their birth-rights, beginning with Aaron, then Moses, so down to the youngest;" and appointed the present plaintiff, Josiah Lewis, his executor.

The jury found the foregoing devises; that Richard Mullington died in November, 1776; that Lucy Lewis, the legatee in the will mentioned, was married to the defendant on the 10th February, 1779; that the negro girl Amy, in

the declaration mentioned, is the child and natural issue and increase of said negro Moll; that she was born after the decease of the testator, and after the said negro Moll was delivered to the defendant, to-wit, on the first day of March, 1779; that the defendant is husband to Lucy Lewis in the said will named; that the executor of said will assented to said legacy to defendant's wife, and that negro Amy was in the possession of the defendant on the 10th day of May, 1787, and was at that time demanded by the plaintiff, executor of said will; that the defendant Shipman refused to deliver her up, and that she is of the value of £250; and that Aaron Lewis and Moses Lewis, the legatees, are also living. Whether the law be for the plaintiff or defendant, the jury are ignorant, and pray the advice of the Court. If it be for the plaintiff, they find, &c.; if for the defendant, they find, &c.

By the Court. The rules of the ancient common law, respecting personal goods and chattels have been disregarded, and a man by deed or will may dispose of the use of his books or furniture to one man, and the remainder over to another, and the remainder will be good. 2 Blac., 398. And of course, he may in like manner dispose of any part of the increase of his personal estate, but not in such manner as to create a perpetuity. The plaintiffs are entitled to recover the negro slave in question.

NOTE.—See *Pearson* v *Taylor*, 1 Dev. & Bat. Rep., 60. *Conner* v *Satchwell*, Ibid, 72

JUNE TERM, 1801.

JOHN SIMPSON v. JEAN NADEAU.—Page 115.

The question of "prize or no prize" is exclusively of admiralty jurisdiction, even though the vessel captured was not carried in for condemnation.

This case was as follows: Some time about the beginning of the year 1796, the schooner Bellona, a privateer commissioned by the Republic of France, in a cruise off the island of Jamaica, fell in with the brig called the Sally, loaded in part with sugars and coffee, and in part with American produce. The brig had no register on board, and the privateer took her on the high seas, under the *pretense of a prize*, carried her into the port of St. Jago, in the island of Cuba, within the Spanish dominions, and without any regular form of condemnation sold said brig and cargo. Afterwards the said Simpson instituted an action of trover against the said Nadeau in the Superior Court of Newbern district, upon the principle, that he was owner of said brig and cargo; that he was an American citizen, and consequently that said brig and cargo were neutral property, and not liable to capture; and that said Nadeau was owner of said privateer, and as such, liable to the plaintiff for damages by reason of such capture. On the trial, Simpson proved a property in said brig and cargo, and obtained a verdict for £1245 and costs, subject to the opinion of the Court, *whether the Court had jurisdiction of the cause.*

Haywood, for the plaintiff.—The plaintiff, who is a citizen of North Carolina has had his property taken upon the high seas, and it is said he can have no remedy in this Court. If the maritime Courts have not jurisdiction then to do justice, this Court ought to take jurisdiction. To ascertain the proper tribunal before which this question ought to be heard and determined, we must take a view of Admiralty Courts, and they are divided into two, the one

called the prize court, the other the instance court; the first has power to enquire whether a capture is legal or not, and to award restitution where the capture is illegal. The admiralty court does not take jurisdiction because the property has been on the high seas. In the present case the prize was not carried into a country where a decision could be had—if the vessel had been carried into a French port, the court of admiralty would, on the facts declared in this case, have determined the capture to be illegal, and awarded costs and damages against the captors and the vessel to be restored. If the Federal courts and prize courts of this country have no right of enquiry into this subject, then it clearly results that this court has a right, and unless it had the maxim that for every wrong the law provides a remedy, would be evaded.

The first process used in Courts of Admiralty, is to seize the vessel, but here the vessel was not within the jurisdiction of the courts of this country. Let us enquire whether the thing having been done on the high seas, gives jurisdiction to the other branch of the Admiralty Court, called the Instance Court; and I contend, that the latter has a concurrent and not exclusive jurisdiction, and if a court of common law, has first got the cause before it, it ought to proceed, and in such a case, no prohibition ever did or can issue where the court of common law has the cause before them; no case can be shewn where a cause brought in a court of common law was abated, because a court of admiralty had jurisdiction.

I will first shew that this branch of the admiralty court cannot have jurisdiction, unless they can proceed in Rem. 1 Com., 392—Godbolt, 260. The first process is against the ship and goods. The same doctrine to be found in 3 Dallas, 186. The cause here reported was dismissed because the vessel was *infra presidia*, and the court could not proceed in Rem; the prize courts have exclusive jurisdiction, because they decide according to the laws of war, and the laws of nations, and it would be very unsafe to trust the municipal courts to decide on those laws. The second branch of the admiralty court, i. e. the instance court,

judges on the municipal laws, and consequently has jurisdiction concurrent with the courts of common law.

In all transitory actions, by fiction, the cause of action arising in foreigh countries is said to have arisen in the country where the suit is brought; 3 Black. Com.——— establishes this doctrine, and proceedings of admiralty courts are very familiar to those in the municipal courts, embracing some cases growing out of particular treaties and foreign laws. Formerly complaints were made that the courts of common law had taken jurisdiction of causes arising on the high seas, by a fiction; to these complaints it was answered by the judges of the courts of common law, that no prohibition has ever been granted—4 Co. Inst., 134—that the prize courts have no jurisdiction, because the thing is not within their power, and the instance courts have only a *concurrent* jurisdiction with the courts of common law.

It has been said that the plaintiff ought to sue in the prize court of France. Was he to do so, he would be told that the *subject matter* never came within their jurisdiction; when, therefore, he cannot sue in the maritime courts of our own country, and this court has power to give him redress, it surely ought to do it.

I will now shew, that for a taking on the *high seas*, an action will lie in a court of common law, unless the vessel was taken *as a prize*—Douglas, 603. The case here cited proves that the admiralty court has not exclusive jurisdiction, and had it been otherwise, the court of common law would have dismissed the cause. And this case further shews the clear definition of the prize and instance courts to be such as I have given.

It will be insisted that the vessel *was taken as prize*, and therefore the courts of admiralty have *exclusive* jurisdiction; the case states the vessel to have been taken on *pretence* of *prize*. The jurisdiction of the court extends to cases of all descriptions, and will proceed unless it is disclosed that another court has *exclusive* jurisdiction, and the objection to the jurisdiction of the court, put on the record in proper time, which not being done, it gives the court

jurisdiction and they will proceed, and unless the court are apprised that it was taken *as prize*, they will give judgment; 1 Shower, 6. 3 Mod. Reports, 194—same case.

I insist upon it, even if the ship was taken as prize, the objection comes too late to oust this court of jurisdiction; it ought to have been pleaded in time; Co. Litt, 127; whenever a defendant enters a plea which constitutes a general defense, he cannot afterwards be permitted to object to the jurisdiction of the court; 1 Mo., 181. 2 Mo., 273. The jurisdiction of this court attached on the cause immediately on the defendant's pleading the general issue.

If a cause is depending in an inferior court, it ought to appear by the proceedings, that the cause is clearly within the jurisdiction of that court, otherwise the judgment will be reversed—but in a court of general jurisdiction, it is too late to make an objection against the jurisdiction after it is admitted by the pleadings.

Admitting that the cause of action here arose on a taking as prize, yet it ought to be shewn, and they ought to prove clearly that it was taken as prize, and was a legal capture —and if it be not shewn that it was taken as prize, then it must be taken as trespass. If France and Great Britain are at war, and the cruisers of one power take the vessel of a neutral nation, the taking cannot be held as prize, but mere trespass; and this action being in trover creates no difference. If it be alleged that the Bellona had a commission from the French Republic, to cruise and make captures; yet it ought to be shewn that the taking was in pursuance of the commission; and she certainly had no power to capture American vessels. What does the commission authorize? It can only authorize the taking of vessels belonging to enemies, or the vessels of neutral nations engaged in contraband trade, and to constitute the taking these as prize, there must be a condemnation by a proper tribunal.

By the treaty made between America and France, whenever a vessel is taken by a French privateer, it must be carried into port to be tried by a French court; and if the captor does not carry it into a French court for trial, the

taking to be held a trespass *ab initio*. By the laws of nations, he ought to carry it into port for trial, in some court of competent jurisdiction ; if he does not, the taking is a trespass. This doctrine is to be found in 1 Dallas, 106, and the consequence deducible from his not doing this, is that he is a trespasser *ab initio*.

By the 13th article of the French treaty, it is expressly stipulated, " In order to regulate what shall be deemed contraband of war, there shall be comprised under that denomination gunpowder, saltpetre, petards, match, ball, bombs, grenades, carcasses, pikes, halberts, swords, belts, pistols, holsters, cavalry saddles and furniture, cannon, mortars, their carriages and beds, and generally all kinds of arms, munitions of war, and instruments fit for the use of troops : all the above articles, whenever they are destined to the port of an enemy, are hereby declared to be contraband, and just objects of confiscation ; but the vessel in which they are laden, and the residue of the cargo shall be considered free, and not in any manner infected by the prohibited goods, whether belonging to the same, or different owner." It clearly appears from the conduct of Nadeau, subsequent to the capture, that he never intended to have her tried, and that he did not pursue his authority, and commission.—Whenever a man acts under an authority, and does not pursue it strictly, he shall be taken a trespasser *ab initio*. 6 Carpenter's case, 2 Stra., 1184.

Jocelyn, for the defendant. The facts in this case, out of which arises the question now submitted to the court, in a few words, are these :

The Bellona privateer commissioned by the Republic of France, in a cruise off the Island of Jamaica, fell in with and captured the brig———loaded in part with sugar and coffee, supposed to be the produce of the British plantations, and without a register on board to designate the country to which she belonged. Under these suspicious circumstances, the privateer took her as and for a prize, carried her into the Island of Cuba, and sold vessel and cargo without the formality of a legal condemnation.

The plaintiff, who was owner of the brig and cargo, instituted an action of trover against the defendant, owner of the privateer, upon this principle, that the defendant is owner, is liable for the acts of the captain, and as the captain illegally took the brig and cargo, the presumption in law is, that the same came to the hands of the defendant, and consequently that he is guilty of the trover and conversion charged in the declaration.

The jury gave a verdict in favor of the plaintiff, subject to the opinion of the court, whether it has jurisdiction of the cause; and on behalf of the defendant, I am to shew that it has not. This principle I shall endeavor to establish upon two grounds:

1. That the privateer having acted under the orders, and in conformity to the existing regulations of its own government, the owner cannot be made personally liable in *any* court of this country, to a citizen of a neutral country, for any damages this neutral may have sustained by reason of a capture, however contrary to the law of nations this capture may have been. It is purely a matter of government, and the injured party must apply to government for redress.

2. Admitting, however, that there are courts in this country competent to give redress, and to which the plaintiff might have applied for relief, I contend that the federal district admiralty court has sole jurisdiction in the present case, and that a court of common law can take no cognizance thereof, but that the admiralty court alone has jurisdiction, exclusive of every common law court whatsoever.

In respect to the first point: The French government conceiving the interests of their nation materially affected, and the safety of their commerce endangered in some essential particulars, by the operation of some clause in the treaty entered into between this country and Great Britain, passed a law authorizing their cruisers and armed vessels to capture neutral, and particularly American vessels, having on board any article of British manufacture, or of the growth and produce of their colonies, &c. Under the authority of this act, the privateer captured the plaintiff's brig, justified in

such capture by the other circumstance, to-wit, the want of a register. If this privateer then has simply pursued the orders of its own government, and in consequence thereof, the plaintiff has sustained an injury, I apprehend that it is not in the power of any court in this country to grant relief. Neither ought a court of judicature to take cognizance of such a case. Application should be made to the Executive, by whom compensation will be demanded from the offending nation.

It would be a strange construction of the law of nations, and the thing impracticable in itself, were each and every individual of that country by whom a capture has been made, liable to the claims of those whose property has been taken upon the high seas, which country has thought proper to pass a law for that very purpose.

If the government to which the sufferer belongs, cannot procure justice from the hostile nation, reprisals would be justifiable upon the principles and for the reasons laid down in the case of Hughes and Cornelius, 2 Show., 232.

One important object of our mission to France, was to procure compensation for spoliation and illegal captures. It is not to be presumed that our envoys would demand, much less that the French Government would consent to a double satisfaction; that is to say, that each injured individual, in a court of this country, should be permitted to obtain satisfaction for his particular damage, and afterwards be entitled to the same amount, through the medium of a treaty. Besides, the courts of the several States, not bound by the law of nations, nor by the decisions of each other, might and most probably would decide differently upon the same subject, by means of which, infinite confusion would ensue, in consequence of such contrary adjudications.

2. But admitting, however, that there are courts in this country, competent to give redress, I contend that in the present case, a court of common law has no jurisdiction whatsoever, not even a concurrent jurisdiction; but on the contrary, that a court of admiralty is the proper tribunal to which the plaintiff ought to have applied for relief; that it

has complete and sole jurisdiction, exclusive of all common law courts whatsoever.

There is no principle more firmly established, no point of law better known and understood, than this, that a court of common law cannot determine a question of prize or no prize; and further, if the principal taking was as prize, a court of common law cannot entertain jurisdiction of any incident connected with it. On the contrary, if the admiralty had jurisdiction of the original question, they must necessarily determine every circumstance incident thereto.

This has been settled by a series of decisions for ages, and the doctrine has never been shaken even by a single authority. Molloy, new ed., 57, 58, 59, 85; 1 Lord Raymond, 271; Cro. Eliz., 685. 1 Lev., 243; v. Mod., 340; Doug., 595; 3 Term Rep., 323; 3 Blac. Com., 108; 1 Dallas, 221; 2 Dallas, 160; 3 Dallas 6, 54; 4 Term Rep., 385; Carth., 398; 2 Keb., 360.

Upon the principle, then, that the law is as I have stated it to be, it only remains to examine whether the present case is virtually, as well as in express words, within the authorities cited. This will instantly appear by referring to the facts: The Bellona privateer, commissioned by the Republic of France, employed in an hostile manner against the subjects of Great Britain, between whom and the citizens of France an open war existed, in conformity to the laws and regulations of its own government, upon the high seas, took the plaintiff's brig as and for a prize. The plaintiff, who claims to be an American citizen, and consequently a neutral, states that this brig and cargo, being neutral property, were not, by the law of nations, liable to capture, and therefore he has brought an action of trover at common law, to recover damages for the tort.

What then are the court called upon to decide? Before they can sustain this cause, and render judgment for the plaintiff, they must first decide upon the validity of the capture; they must first determine the taking to have been illegal, and of a necessary consequence, pronounce an opinion upon the question of prize or no prize.

If the captors were authorized and justified in taking the brig; if she really was liable to capture, and was a good prize, then it is evident, that the plaintiff ought not to recover upon the intrinsic merits. But whether the captors were authorized and justified in taking the brig or not, whether the capture was legal or not, and whether she was a good prize or not, are questions, I undertake with submission to say, never were determined in any court of common law governed upon principles similar to ours; but such cases in every instance have heen uniformly declared cognizable in a court of admiralty alone.

View this cause in the gross or in the detail; bring it forward in any form of action whatsoever, whether trover or trespass; analyse it into all its parts, and under every circumstance, still this great and important question, that is to say, Was the plaintiff's brig a legal prize or not, will stand forward, exposed and distinguished, as the most prominent feature of the whole case.

Let the action be what it may, yet this previous question must be first disposed of, before the plaintiff can be entitled to a judgment. If this court render judgment for the plaintiff, they at the same instant pronounce the capture to have been illegal, and the brig no prize. And if in any collateral action, such a question can be determined in a court of common law, the admiralty court, by a fiction, may be deprived of jurisdiction in every instance.

It is highly reasonable that such exclusive jurisdiction should be vested in the admiralty courts, and it is founded upon maxims of the best policy. Sovereign independent States acknowledging no superior, must necessarily resort to some tribunal governed by laws and usages, which possessing no force but by the consent of all, must, when that consent is obtained, necessarily be binding upon all. This consent is the law of nations, and this tribunal the admiralty court, governed by the law of nations, and not by the municipal law of any particular kingdom or State; for the municipal law is not binding upon any but those who belong to or reside within the limits of such particular

Kingdom or State; whereas the law of nations is binding upon the whole world, for the whole world are parties to, and bound by the decrees of an admiralty court.

From these observations, and many others to the same purpose that might be adduced, I hope I may with confidence conclude, that this court, as a court of common law, has not jurisdiction of this cause. Because, in this case, is necessarily involved a question of prize or no prize, which, with all its incidents, are exclusively cognizable in a court of admiralty.

Many objections have been raised to the application of the foregoing principles to the present case, which it will be necessary to examine. These objections may be classed under the following heads.

It is stated by the counsel for the plaintiff,

1. That the federal district admiralty court is not competent, and does not possess sufficient power to grant the plaintiff adequate relief.

2. That if the admiralty court possesses any jurisdiction, it must be as a prize court, and not as an instance court.—That as a prize court, it cannot proceed, unless the subject matter, that is to say the prize itself, be within the reach of the court, for the proceedings are *in rem* and not *in personam.*

3. That the captors did not carry the prize *infra præsidia*, neither was she legally condemned, consequently the captors are trespassers *ab initio*, and liable to the origina owner in an action of trespass or trover in a court of common law.

4. That the courts of common law have concurrent jurisdiction with the admiralty courts. And although the Superior Court of Common law will frequently grant a prohibition to the admiralty courts; yet such common law courts will not send a cause originally instituted before them, to be tried in the admiralty.

5. That the defendant ought to have pleaded to the jurisdiction of the common law court, and could not take advan-

tage of this court's want of jurisdiction under the plea of not guilty.

With regard to the first objection, I do not hesitate to declare, that if the District Admiralty court had not competent jurisdiction, and possessed no power to afford relief in the present case, that a court of common law ought to hesitate some time, before it should pronounce that the plaintiff must go without remedy. But on examination, it will be found that the Admiralty Court possesses full and ample power for this purpose. It is enacted in the 9th section of the Judiciary Bill, that the Admiralty Court shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction. The word civil is here used in a sense opposed to criminal, and embraces every cause cognizable by the tribunal, either on the prize, or instance side of the court. 3 Dall., 12, 13.

As to the second objection, it is laid down by the Supreme Court of the United States, in the case of *Glass*, et al. v. *The Sloop Betsy*, et al., 3 Dall., 16, that the Admiralty Court considered either as an instance or a prize court, possesses all the powers of an Admiralty Court; and it will appear, that there was no circumstance in the present case which could have prevented the plaintiff pursuing his remedy in that court to the utmost extent of satisfaction.

In the first place, in order to obtain a decree for damages, it is not necessary, as I apprehend, even on the prize side of the court, that the subject matter, that is to say the prize itself, should be within the reach of the court. In some cases it would be impossible, and in others impracticable.

Suppose a privateer, in a manner obviously *illegal*, should capture a neutral vessel and order her to port, and on the passage the prize should be lost—in this case it would be impossible to proceed in rem. or bring the subject matter before the court—and yet I conceive there can be no doubt, but that the original owner of the captured vessel, might proceed, by libel, against the captors and recover ample damages for this illegal taking, as completely as if the prize were in the hands of the Marshal of the Court.

Again, suppose the captors should take a vessel as prize, and sell her in some foreign country without any regular condemnation, and so contrive, that she should never come within the reach of the Court. In this case, although the subject matter is still in existence, yet by reason of the illegal conduct of the captors, the original owner is entirely prevented from pursuing his claim in rem, and if the doctrine contended for by the plaintiff's counsel be correct, the former owner can never be entitled to satisfaction in this case, although he is deprived of the means, by the captor's own wrong, which the law will not permit.

Upon an examination of the authorities and the practice of the Admiralty Courts, it seems evident, that in order to entitle the injured party to recover damages for an illegal capture, it is not necessary that the subject matter itself should be before the court—though it may be necessary where restitution is prayed for.

In cases where damages alone are demanded, the practice sometimes is, to issue a monition and notify the captors to bring the prize into Court; Carth., 398. And upon this, whether it is brought in or not, the complainant goes on to a decree.

In many cases this formality is not required; and it is clearly laid down in the suit of *Le Caux* v. *Eden*, Doug., 594; that damages may be recovered in the Admiralty Courts even for a personal injury sustained in consequence of a capture. In this case there was not the least necessity that the prize itself should be in court; neither were the proceedings in rem. but against the captors personally—so in every instance where damages alone are prayed for.

In Clerke's Prax. Cur. Adm. it appears that the first process usually is, by an arrest of the defendant's person who is then compelled to enter into a stipulation in the nature of bail, or a recognizance; 3 Blac. Com., 108. And being in court by this process, the complainant is entitled to proceed for such damages as he can make appear he has in any manner sustained either in his person or goods by reason of this illegal capture.

Then I apprehend, both from the reason of the thing and by authorities, I have shewed that the District Court possesses all the powers of an Admiralty Court, either as an instance or a prize court. That although the subject matter, the prize itself, was not and could not have been before the court, yet the present plaintiff might have proceeded in the Admiralty Court against the defendant in personam, by arrest, and recover ample satisfaction for any injury he had sustained—consequently the District Court was competent to afford him full and adequate relief.

As the cause now is before the court, there is nothing contained in the third objection which can in any manner avail the plaintiff.

The captors carried the prize into a port in the island of Cuba, under the dominion of the king of Spain, who then was in an alliance offensive and defensive with the French Republic, and both at open war with Great Britain. And nothing is more usual, than for two powers so connected to permit their cruisers respectively to carry their prizes to, and condemn them in each other's ports. This privilege was granted by France to American privateers, and was the constant practice between the two countries, during the revolutionary war.

Upon this principle then, the plaintiff's brig was carried as a prize *infra præsidia.*

It does not follow, that because a prize is not legally condemned, that the captors are trespassers *ab initio;* or that they are trespassers in any respect whatever.

The law certainly is this, whenever a vessel has been legally taken, as in the case of a neutral loaded with contraband goods, or endeavoring to enter a port in a state of actual blocade, or an open enemy, the captors are not trespassers in any sense of the word—neither can an action in any form be maintained for this capture.

If the prize has not been legally condemned, the consequence will be this: the original owner may seize her, in the hands of any person, and at any distance of time, wher-

ever she may be found: for until a regular condemnation takes place, the owner is not divested of his property. But still an action of trespass cannot be maintained for the capture, although no condemnation followed; because the taking was at first legal. And the case of the six carpenters, and other cases cited by the plaintiff's counsel, do not in the smallest degree apply to the case of the legal taking of a vessel as prize.

The commission granted to the privateer, authorizes her to take the vessels, goods, &c., of the enemy, and of course the vessels, goods, &c., of those, who, by the law of nations, have placed themselves in the situation of an enemy. Then whether after a legal capture the prize was carried *infra præsidia*, or whether she was legally condemned or not, are circumstances of which the original owner cannot take such an advantage as will enable him to maintain an action of trespass—he can only regain possession of his property, which for want of these formalities, has never been altered, and of which he has never been legally divested.

But admitting, for the sake of argument, that the plaintiff's brig, the prize, was not carried *infra præsidia*, and was not legally condemned, and consequently that damages are recoverable on that account, we are then brought back to the original ground of discussion, and that great question still remains behind: Can a court of common law take cognizance of such a question, and award damages to the plaintiff?

If it be true, as the plaintiff's counsel contend, that unless the prize be carried *infra præsidia*, and there regularly condemned, the captors are trespassers ab initio, and liable for damages, then I ask, do not these important facts form a material part of the question of prize or no prize? Can this or any other court decree damages in such a case, unless it be first ascertained whether the law requires the prize to be carried *infra præsidia*, and also whether it requires a regular condemnation in order to vest the property in the captors? And let me further ask, would not this investigation necessarily lead the Court to decide upon the

validity of the capture, and consequently determine, not collaterally and incidentally, but in the very first instance, the question of prize or no prize?

To me it appears impossible to separate the supposed trespass from the principal taking as prize. This would be to divide between two different jurisdictions, the same entire transaction.

If all this be true, then I apprehend this third objection of the plaintiff is entirely removed, upon the principle before established, viz., that a Court of common law cannot take cognizance of a case necessarily involving in it a question of prize or no prize.

The fourth objection requires but a short answer. Every authority which has been introduced, and many others which might have been read, lay it down as clear, express and settled law, that in every case wherein the plaintiff claims damages for a tort committed upon the high seas, if it appear that the inquiry complained of, was occasioned by or happened in consequence of a taking as prize, that the Courts of common law have no kind of jurisdiction whatsoever, neither of the principal question nor of any circumstance or incident connected with or arising out of it. On the contrary that the Admiralty Courts have sole and exclusive cognizance, not concurrent, but exclusive of all common law Courts whatsoever.

And the cases of *Le Caux* v. *Eden*, Doug., 594, and *Ross*, et al v. *Rittenhouse*, 2 Dall., 160, completely shew, that although a suit be orginally instituted, even in the highest court of common law, yet if it appear to be a cause of admiralty jurisdiction, they will dismiss it and send it to its proper tribunal for adjudication.

With regard to the fifth objection, I have to observe, that the present cause is an action of trover, and it has been repeatedly ruled, that the defendant, in an action of trover, can plead nothing except "not guilty and release;" every special plea amounting to nothing more than the general issue. Further, the declaration is in the usual form, and

in a plea to the jurisdiction, it cannot appear, either by the declaration or plea whether the Court has jurisdiction or not, until the testimony is gone into, and then it would have been too late to take any advantage under the plea.

But without having recourse to the circumstances of this particular case, so far as it involves the question of right pleading, it is sufficient for me to show that the law upon this subject is already settled. Lord Chief Justice Lee, in the case of *Rous* v. *Hazard*, lays it down as a clear principle of law, that if to an action of trespass for taking a ship as prize, the defendant pleaded not guilty, the plaintiff could not recover.

This doctrine is recognized and illustrated by the court in the case of *Le Caux* v. *Eden*—and Justice Buller observes, that upon the general plea of not guilty, no action can be maintained, where the question relates to prize; and for this reason: That if the taking was a trespass at common law, it would have been incumbent on the defendant to have pleaded specially—but that a capture as prize was not a trespass at common law, and therefore under the plea of not guilty, the plaintiff could not recover.

The principle is confirmed by Lord Kenyon, in the case of *Owen* v. *Hurd*, 2 Term Rep., 644, who declares that even the consent of parties cannot give the court jurisdiction, where it had none before; and that the court is bound to take notice that it had not jurisdiction.

Agreeably to these decisions was the cause of Plaice and Campbell, determined by the Circuit Court at Raleigh: It came out in evidence that the plaintiff's right was founded upon a capture on the high seas as prize. Immediately upon this discovery, the court ordered the cause to be dismissed, and said that they were bound to notice their want of jurisdiction, and that it was not necessary, in that case, to plead it.

If, however, this should be deemed an insufficient answer, I have to remark, that the plaintiff is precluded from taking any advantage for the want of this plea: For whether this court has jurisdiction of this cause or not, is the very ques-

tion which the jury, by their verdict, have reserved for the opinion of the court. And the question now before the court is not whether the defendant was bound to plead to the jurisdiction, but whether the court in fact has jurisdiction.

Therefore, as the case now stands, it is totally immaterial whether the plea was entered or not.

Before I conclude, it will be necessary to examine one authority, upon which the plaintiff has very much relied, to prove that the court has jurisdiction. It is the case of *Beake* v. *Tyrrel*, 1 Show., 6. And it is there stated that trespass at common law will lie for the recovery of damages in taking a ship on the high seas as prize.

Did the facts in this case warrant the opinion of the court, and justify the use of expressions in that broad and extensive manner which these expressions seem to import —yet I might assert, and with confidence too, that one solitary authority ought not to weigh against a series of decisions to the contrary; and these decisions made too, many years afterwards, when the learning upon maritime affairs, and the doctrine of admiralty jurisdiction, became much better defined and understood.

But there is not the least occasion to resort to such reasoning, for upon examination it will appear that this case, so far from impeaching the doctrine and undermining the ground upon which I stand, will support both, and be found in an exact line with all the authorities cited.

This case is also reported in 5 Mod., 194; Comb., 120. And upon a review of the whole it appears, that by a charter granted to the East India Company, they had an exclusive right to trade to the East Indies, and that every ship found trading within the limits of the charter, without a license for that purpose from the company, became liable to forfeiture.

It further appears, that the plaintiff was owner of a ship, and that this ship, as an interloper, was seized by the defendant, captain of an armed vessel, for a breach of this clause of the company's charter, in trading within these

limits without a license—and in consequence of such seizure was condemned as forfeited to the company, in some one of the company's courts, erected by virtue of their charter.

The plaintiff instituted an action of trespass against the defendant to recover damages for this capture, and the action was held to be maintainable in a court of common law—and clearly it was so—but the confusion arises in calling this seizure a prize—for it was nothing like a prize in any one particular.

A right to take a vessel as prize is founded upon the *jus belli*, and never permitted except during a state of actual war.

At this period no war existed; it was the case of an English armed vessel taking an English merchant ship, during the time of a profound peace, and procuring a condemnation in the private court of the East India Company—a court, not governed by the law of nations, which is binding upon all nations, but erected under the authority of a private statute, and of whose proceedings and decisions the King's courts were not bound to take the least notice. Therefore it was incumbent upon the defendant not only to plead all these matters specially, but also to prove the truth of them, and also to shew that the court in which the ship was condemned had competent jurisdiction; which he failing to do, judgment was given against him.

The particular circumstances of this case easily account for the observations of Chief Justice Holt, who in delivering the opinion of the court says, "It doth not appear how this ship came to be a prize—it doth not appear that there was any cause to seize her as such, nor shewn that there was any war—it is not shewn whose court of admiralty it was, nor before what judge." Questions, that the learned Judge never would have made, had the ship been taken *jure belli*, and condemned in a court of competent authority.

The whole of this shews, that this vessel was not taken as a prize in the sense we use the term at this day—but seized as forfeited for a breach of the charter and the revenue laws of the company.

It is in principle the same with the following case:—During the suspension of our intercourse with France and her colonies, the President was authorized by act of Congress to grant permits to certain vessels, to go under certain restrictions to the French West Indies.

Suppose then, one of our armed ships should have met an American vessel trading between the French Colonies and the United States, without a permit—should seize and bring her in for condemnation—I ask, in what court would the proceedings be? Undoubtedly on the common law side of the Federal Court, and she would be considered not as a prize, which can only be made in time of war, but as a vessel forfeited for the breach of a particular statute. —And were the owner of this vessel disposed to institute a suit for this taking, the action would be cognizable in a court of common law, agreeably to the above case in Shower.

This decision is in unison with the opinion of the court in the case of *Le Caux* v. *Eden*, and is the very case which Lord Chief Justice Lee had in view when he stated, that for taking a ship on the high seas trespass at common law would lie, but not when a ship is taken as prize.

Considering this as a fair explanation of the case and sanctioned by authorities, I feel no hesitation in saying, with submission to the court, that this case, so much relied upon, will not support the ground upon which the plaintiff's counsel has built his argument.—That so far from proving that the courts of common law have cognizance of the question of prize, it clearly shews that the court entertained jurisdiction of that particular case, for the express reason that the vessel was not taken as prize, but merely forfeited for a breach of the company's charter. And there is no doubt but that the courts of common law have exclusive jurisdiction of all cases of penalties and forfeiture, and every question founded upon, or arising out of them.

Having now, as I conceive, fully answered the objections set up by the plaintiff, I have only to add, that it seems evident that a court of common law cannot take cognizance of any cause in which is involved the question of prize or no prize, and have endeavored to shew that the

present case is completely of that nature, and that judgment cannot be rendered for the plaintiff here, without first deciding upon the validity of the capture, and declaring the prize to have been illegally taken, which a court of common law has no power to do.

I have also endeavored to shew, that the district court has full and adequate power to grant relief, and that no impediment existed which could have deprived the plaintiff of his remedy in that court.

And as the plaintiff has clearly mistaken his remedy, I pray that the cause may be dismissed for want of jurisdiction in this court to sustain it.

Haywood, in reply. The great question in this cause is narrowed to a single point, viz: Whether a court of admiralty has exclusive jurisdiction or not. All the authorities shew, that the instance court of admiralty has concurrent jurisdiction; and those which say they have exclusive, are referable to the prize court. The prize courts have exclusive jurisdiction, because they proceed *in rem*.—the prize court can never proceed unless the thing is within their power. There can be no occasion to apply to the Government for redress, when the person doing the injury comes within the jurisdiction of the court of admiralty on the instance side, and consequently, as I contend, within the jurisdiction of this court.

Jocelyn, in conclusion. Suppose the vessel had been brought into Newbern, would Simpson, in order to recover damages, have his own vessel seized—certainly not; he might have proceeded against the person, and the court of admiralty would have been competent to give relief; 2 Dallas, 165. The question whether prize or no prize being at rest, a libel might be exhibited for damages, by reason of the illegal capture.

If our courts of admiralty are both prize and instance courts, then this case comes completely before them, taking it in either point of view, or whether the proofs be *in rem* or *in personam*.

Mall, Judge. In England there are two admiralty courts of civil jurisdiction ; the one is called the instance Court, the other the prize Court. In many instances the courts of common law have jurisdiction of trespasses committed on the high seas, as for seizing, stopping or taking a ship on the high sea not as prize. But whenever the trespass complained of is a taking, &c., on the high seas as prize, the courts of common law have not jurisdiction. The nature of the question, not the locality, constitutes the rule on which depends the jurisdiction of the courts of common law : But for the taking, &c., as prize, (of which the courts of common law have not jurisdiction,) the prize courts have sole and exclusive jurisdiction ; Doug., 592. A trespass for taking a ship, &c., not as prize, is the object of municipal law. The prize court is governed by rules and regulations peculiar to itself. In this court generally disputes arise not between citizens or subjects of the same, but of different nations. It is therefore proper that such disputes should be determined by the laws and usages of nations, and such regulations as may exist between the nations to which the parties belong ; so that the same rules of decision are common to prize courts, whether established in one country or another. The powers of the instance courts and prize courts constitute the extent of jurisdiction of the courts of admiralty in the United States; 3 Dallas, 16. It appears from the record in this case, that the defendant captured the brig by virtue of a commission from the French Republic, and in consequence of the said brig's being without a register, &c.; the defendant sets up no claim to the brig, nor justifies the taking of her on any other ground : Is this then a question of prize or no prize or not ? I think it is, and that this court consequently has not jurisdiction, but that the court of admiralty has sole and exclusive jurisdiction in cases of this description.

It has been urged for the plaintiff that this matter ought to have been pleaded to the jurisdiction of the court, and that the not pleading it in that form is a waiver of it ; but consent cannot give original jurisdiction to a court which

has it not; 2 Burrow, 746; 2 Wash. Rep., 215. It was decided in the case of *Row* v. *Hassard*, cited in Doug., 581, that the plaintiff could not recover in trespass for taking a shipas prize, the plea of not guilty being pleaded. It has also been urged for the plaintiff, that unless the court will grant him relief he will be without a remedy, because only the person of the defendant is within the reach of the courts of admiralty, and those courts will not proceed against the person in the first instance.

I think this is a case of prize or no prize, and that the courts of admiralty have exclusive jurisdiction of it. I know of no authority warranting an exception from this general rule, in the case where the person of the captor only, and not the vessel captured, is within the jurisdiction of the courts of admiralty. It has likewise been urged for the plaintiff, that as the defendant converted the brig to his own use before any adjudication took place respecting her by a proper tribunal, he ought to be considered a trespasser, *ab initio*. In order to ascertain the merits of that argument, we must have recourse to the particular usages and regulations that may exist between the countries to which the plaintiff and defendant may belong. To go in search of these, would lead us out of our course: they exclusively belong to the prize courts. If it is said that the brig Sally belonged to the citizen of a neutral nation, and therefore could not be the subject of prize, it may be observed that the owner of a neutral ship may violate his neutrality by carrying contraband goods, by taking part with one of the belligerent powers improperly, &c. Whether the being without a register, &c., would justify a capture, &c., is not I think for this court, but a prize court to determine. I am of opinion, therefore, that however strongly the justice of this case may plead for the plaintiff, that this court has not jurisdiction of the subject matter for which this suit has been brought, and that judgment should be entered for the defendant.

Johnston, Judge. In this case, in order to decide whether the plaintiff has a right to recover, it must be enquired

into, whether the vessel and cargo were prize or not; and it stands admitted in every case where the question of prize or no prize must be decided, that the courts of common law have no jurisdiction, but that it appertains exclusively to the courts of admiralty. There are cases where the courts of common law have taken cognizance of torts committed on the high sea by one British subject on the property of another; but do not find that in any instance they have sustained a suit by a subject against a foreigner acting under a commission from his sovereign.

MACAY, J. This case states that the brig and cargo were taken on the high seas under the pretense of a prize, by the privateer Bellona, commissioned by the Republic of France, the brig and cargo carried into the Spanish port of St. Jago, in the island of Cuba, and there sold without any regular condemnation. That the defendant was owner of the privateer, that the brig had no register on board. The plaintiff, being an American citizen, claims said brig and cargo as neutral property, as not liable to capture. A verdict has been obtained in this case in the Superior Court of law for the district of Newbern, subject to the opinion of the court on this question: Whether the court has jurisdiction of this case? To determine this question, it will be necessary to enquire whether this brig and cargo were taken on the high seas as a prize, and, if so taken, whether she was or was not a prize.

The case states that she was taken by a privateer commissioned by the Republic of France, "under the pretense of a prize," that she had no register on board. The expression, according to my understanding, is the same as if the case had stated, she was taken as a prize; the caption was for the purpose of making a prize of her and cargo: then the other question arises, was she a prize or not? To determine this, the court of admiralty has the sole, undisturbed and exclusive jurisdiction, which they are bound to determine agreeably to the law of nations. 3 Black, 108; 69 Doug., 504; *Le Caux* v. *Eden*, 2 Dall., 160; 4 Term Rep., 382; 1 Mol., 57; 3 Durn. & East.,

341, 343, 344. In opposition to these authorities I find but one, Comb., 120., *Beake* v. *Ferrell*, in which it appears, that on the question prize or not, the courts of common law and admiralty have a concurrent jurisdiction. In 1 Show., 6, this case is also reported and explained: She was seized by the East India Company, and there condemned by their admiralty. The question prize or no prize, to be determined by the law of nations, made no part of this question. All the other authorities that I have been able to examine, do expressly state that the courts of admiralty have the sole and exclusive jurisdiction of determining prize or no prize. It is true that trespasses may be committed on the high seas by one ship taking goods from another tortiously, and by various other means of which the courts of common law have jurisdiction. Where the admiralty court has not original jurisdiction of the cause, the jurisdiction of the courts of common law is not entirely taken away. 3 Blanc., 108. Comb., 462. But in no case have they interfered where the question, as in the present case, is prize or no prize. I am of the opinion that the Superior Court of Law had not jurisdiction.

Judgment for defendant.

NOTE.—See acc. *Hallett* v. *Lamothe*, 3 Murph. Rep., 279.

WILLIAMSON'S ADM'RS v. SMART and KILBEE.—Page 146.

The personal estate of an intestate, no matter where it be, is distributable according to the laws of the country where the intestate was a resident, or, in other words, where he was a citizen or subject at the time of his death.—Therefore, *it was held* that slaves in Virginia which belonged to the estate of an intestate, who was a citizen and an inhabitant of this State, must be distributed according to the laws of this State.

A person is not bound by a judgment to which he is neither party nor privy.

This was an action of trover, brought in Halifax Superior Court of Law, to recover the value of several slaves, and

the following special verdict was found; viz.—That Thomas Davis, in the year of our Lord 1724, on the 4th day of March, duly executed his last will and testament, as follows, viz:

"In the name of God—AMEN—I, Thomas Davis, of the upper parish of the county of Isle of Wight, being of sound sense and memory, and calling to mind the certainty of death, and the uncertainty when, do make this my last will and testament, &c. I give and bequeath to my sons Thomas Davis and William Davis, all my tract of land I bought of the widow Blake, to be equally divided among them; my son Thomas to enjoy that part whereon he now lives, and my son William that part where my son lived. I say I give the lands unto my aforesaid sons and their heirs forever, and my will is, that if either of my aforesaid sons shall think fit to dispose of his part, that the other shall have the refusal, if he desires it, paying a reasonable rate. *Item*, I give and bequeath to my daughter Frances Williamson, the *use* of my negro Sarah, for and during her natural life, and after her decease I give the said negro Sarah and her increase, amongst the children lawfully begotten of her body to be equally divided among them. Which said negro girl Sarah so bequeathed, shall be in full of any further demand of any part or parcel of my estate; and I declare that my son George Williamson, and my daughter, shall have no more right to claim anything else. *Item*, I give unto my loving wife Elizabeth Davis, the plantation I now live on, for and during her natural life, and after her decease I give the said land to Benjamin Davis and to his heirs forever. *Item*, I give to my grandson Thomas Davis, a negro boy called Robin, and the heirs of his body lawfully begotten; and for want of such heirs after his decease, I give the said negro to my son Benjamin and to his heirs forever. *Item*, I give to my son Thomas Davis, and his heirs, my negro boy Harry. *Item*, I give to my son William Davis and his heirs, my negro boy called Sam. I give and bequeath to my loving wife, the use of my negro woman Cate, during her life, and after her decease I give the said negro woman and her

increase unto my son Benjamin Davis and the heirs of his body, and for the want of such heirs then to Thomas, William, Edward and Benjamin Davis, to be equally divided amongst them. *Item*, I give to my wife during her widowhood, my negro boy, Dick, and afterwards I give the said negro boy Dick unto my son Edward and his heirs. *Item*, I give unto my loving wife Elizabeth, my plantation bought by me of William Exum during the term of her widowhood, and no longer. *Item*, I give my lands aforesaid, bought of William Exum, unto my son Edward Davis and his heirs forever. *Item*, I give and bequeath the use of all the rest and residue of my estate unto my loving wife during the term of her widowhood: when she shall marry again, I give the same to be equally divided amongst my sons, Thomas, William, Edward and Benjamin, share alike with her, and do appoint my loving wife Elizabeth Davis sole executrix of this my last will, hereby revoking any and all other wills, whether by word or deed, heretofore made or done.————————Witness, my hand this 6th of March, 1721."

Signed, THOMAS DAVIS, Seal.

Which was duly admitted to probate in the court for said county of Isle of Wight, on the 23d of April, 1722. And the jury do further find, that the said Frances Williamson, in the said will named, had six children lawfully begotten, and among others her son William Williamson, who moved into this State, then province, and died in the year 1768, in the month of April, leaving nine children, and amongst others George Williamson, his eldest son and heir-at-law. And the jury further find, that the said Frances Williamson departed this life some time in the month of January or February, 1769. And the jury further find, that on the 23d of March, 1769, the following proceedings were had in the county court of Amelia, in the dominion of Virginia, as appears by the copy of the record in these words:

At a court held for Amelia county, March 23, 1769,

Jacob Williamson, George Williamson, John Morely & Elizabeth his wife, Henry Turpin & Annie his wife,
v.
George Williamson, an infant under the age of 21 years, by George Williamson his guardian, & Nathaniel Williamson, an infant, by Nathaniel Williamson his guardian.
} In Chancery.

This cause was this day heard upon the bill of the complainants and the answer of the defendants. In consideration whereof, it is decreed and ordered, that William Archer, John Scott, William Giles and Edward Ross, or any three of them, do divide the slaves in the bill mentioned, viz.: Sharper, Dick, Peter, Doll, Cæsar, Edith, Patt, Sall, Cate, Jane, Sall, Phœbe, Lucy, Dill, Phill, Lewis, Aggy, Hannah, Sall, Bob, Sukey and Roger, agreeable to the last will of Thomas Davis, deceased; and that they allot and assign unto the plaintiffs each a sixth part thereof, having regard to the value of the slaves in said division; and that they make report to the court in order to a final decree.

Amelia County, March 31, 1769.

Pursuant to the above decree, we have divided the negroes, and allotted them to the persons therein mentioned, in the following manner, viz.: John Moreley's lot, Dick, Cate, Lewis and Lucy—Jacob Williamson's lot, Sharper, Cæsar, Edy and Dill—*George Williamson, son of William Williamson*, Sall, Sall, Hannah and Phœbe—Henry Turpin's lot, Peter, Doll, Sall and Patt—Nathan Williamson's lot, Aggy, Sukey and Bob—George Williamson's lot, Jane, Roger and Phil.

And the jury further find, that the said Sall, Sall, Phœbe and Hannah, in the said division named, were a part of the increase of the said negro woman Sall, in the aforesaid will of the said Thomas Davis mentioned, and a sixth part of the negroes descended from said negro Sall.

And the jury do further find, that Sarah, in the said will, bequeathed, was at the time of the death of the said Thomas

Davis, in the dominion of Virginia; and the said other negroes, Sall, Sall, Hannah and Phœbe, from the time of their birth until the day of the division above mentioned, had also continued in the dominion, now State of Virginia.

And the jury do further find, that the said William Williamson above named, died in this province, in the county of Bute, in the month of April, in the year 1768, and that his widow, one of the plaintiffs, since married to Peter Cox, the other of the said plaintiffs took out letters of administration on the estate of the said William Williamson, the 9th day of February, 1769.

And the jury do further find, that the said George Williamson, by his guardian George Williamson the elder, did receive and take into his possession, the said negroes in the said record of the court of Amelia above stated; and sometime afterwards, upon coming to age, he brought said negroes into this State; and that the said negroes afterwards had the following increase, viz.: John, Cate, Lewis, Fanny, Arthur, Nancy, Rachel and Milley.

And the jury do further find, that the said George departed this life in the month of August, in the year 1780, leaving his widow and a child named Nathan. And the jurors do further find that their possession was a joint possession.

And the jurors do further find, that the wife of the said Kilbee obtained letters of administration on the estate of her husband George Williamson the younger, soon after his death, and the said Peter Smart is the guardian of the child of said George Williamson, deceased.

And the jurors do further find, that the said Peter Cox demanded the said negroes of the said Smart and Kilbee, in right of his wife as administratrix, in the year 1786. With respect to the law, the jurors are ignorant, and pray the opinion of the court thereon—if it be for the plaintiff, they assess his damage to £800—if for the defendants, they find them not guilty.

Hall, J. In this case both the plaintiffs and defendants

claim the negroes for which this action is brought, under William Williamson, one of the legatees of Thomas Davis. The special verdict states, that William Williamson removed himself to and become a citizen of this State, where he lived to the time of his death. It is admitted that, at the time of his death, by the laws of Virginia negro property was made to descend like land to the heirs-at-law, he making on that account some pecuniary satisfaction to the next of kin; and that at that time, by the laws of this State, property of that description was made distributable equally amongst all the children of an intestate. The question is, whether the negroes for which this suit is brought shall be disposed of agreeably to the laws of Virginia, (they having been in Virginia at the time of the death of William Williamson their owner,) or by the laws of this State where William Williamson was a resident at the time of his death. I take the rule of law in each case to be this: that the personal estate of the intestate is distributable according to the laws of the country where the intestate was a resident, or, in other words, where he was a citizen or subject at the time of his death. Ambler 25, 415. 2 Vasey, 35. Although by the laws of Virginia negroes are made to descend like land to the heir-at-law, in many other respects they are considered to be personal estate; and indeed our law would view them as personal estate, when any case like the present would occur, notwithstanding the laws of Virginia would ever view them in all respects as real property. I cannot think the decree made by the court of Amelia strengthens the defendant's title, because the plaintiffs were not parties to it—had they been parties to it, and the grounds on which the present pretensions rest been made known to that court, I presume their decree would have been different. I think that all the children of William Williamson are equally entitled to the property in dispute among whom the plaintiff will be compellable to make distribution, after debts are paid, &c., and that judgment should be entered for the plaintiffs.

Johnston, J. Judge Taylor having fully explained

the principles on which I found my decision, it is unnecessary to repeat them—I concur fully with him.

Taylor, J. The material facts of this case are, that Thomas Davis by his will, which was admitted to probate in the year 1722, bequeathed a female slave, of the name of Sarah, to his daughter Frances Williamson, during her life, and after her decease, the wench and her increase to be equally divided among the children of Frances. Frances had six children, one of whom, William, removed into this State and died in 1768, leaving a widow and nine children; George being his eldest son. Afterwards, in the beginning of the year 1769, Frances died; upon which the issue of Sarah were divided, under the authority of a Court of Chancery in Virginia. A sixth part was allotted to George, as the heir-at-law of William—this was received by his guardian, and afterwards upon his arriving at full age brought into this State by himself; until which time, all the negroes descended from Sarah had remained constantly in Virginia. George died in the year 1780, leaving a widow and child, who possessed themselves of the negroes, which they have retained ever since. The widow of William administered upon her husband's estate, and afterwards intermarried with Peter Cox, who, together with his wife, hath brought the present suit, to recover the negroes as of the goods and chattels of William; having previously demanded them of the defendants, one of whom defends as administrator in right of his wife, to George Williamson, and the other as guardian to George's child.

From these facts two questions arise: one is, whether the division made in Virginia ought not, as far as it respected the share claimed through William, to have been according to the laws of this State, whereof William before and at the time of his death was a citizen and inhabitant? The other is, whether, upon the supposition that the division was improperly made, the decree directing it is not conclusive, as the sentence of a court of competent jurisdiction.

As to the first, I consider it perfectly clear and well settled, that although the descent of lands is to be regulated according to the law of the country wherein they are situated, yet the succession and distribution of movable property is to be guided by the law of the country where the owner has his domicil. This is a principle of the law of nations, which hath been recognized and sanctioned by a variety of adjudications. 2 Vesey, 35; Ambler, 25; 4 Term, 184, &c; Bl., 131, 437, 691; Ld. Kaimes, 274; Vattel, b. 2, c. 7, s. 85; c. 8, s. 109, 110. I can entertain no doubt that these authorities must be approved and acted on, by the courts of this State, upon an application to distribute the effects of a foreigner, if made within due time; and that they would receive evidence of the law according to which the distribution was sought. I do not indeed reco'lect any decision upon this point in our own courts; but my opinion is founded no less upon the weight and number of the cases, than upon the intrinsic justice of the principle which pervades them. It seems also to acquire strength in its application to the United States, from the nature of their political relations, which are calculated equally to cherish a spirit of friendly intercourse amongst their respective citizens, and to promote in each State a respectful deference to the laws of all.

The court of Virginia would without doubt have given effect to the claims of the other parties concerned, unless there be some law of that State expressly to prevent it: The existence of such a law, however, cannot well be imagined, because there can be no reason wherefore that State should be concerned about the manner in which strangers hold that sort of property, which they may freely carry away with them. All that, as a State, they can be interested in ascertaining, is, whether the party asserting a claim, has really a right, according to the laws of his own country; and whether those laws vest a chattel in one person, or direct its division among twenty, they equally merit respect and observance. Therefore, if in the State of Virginia this property is clothed with some of the qualities of real estate—if like that it is made descendable to

the heirs-at-law, and exempted from the payment of debts, where there are sufficient assets without it, so far as its nature is changed; but in all other respects it remains and must be considered as chattel property—and the local policy which hath thus distinguished it, must necessarily confine the operation of the laws respecting it to the citizens and inhabitants of that State: This must be understood, however, in relation to the laws ascertaining the right, and not those prescribing the remedy. The latter must, from their nature, bind equally strangers and citizens.

Slaves being then chattel property, notwithstanding incidents annexed to it applicable only to the citizens of that State, there is a conflict of laws in the two States relative to them; and in every such case, the laws of the country where the owner resides must prevail. 2dly. The order made by the Court of Chancery in Virginia, relative to this division, cannot be conclusive as to the title of the negroes in question. Of the persons claiming a right under William, George alone was party to the suit in which it was pronounced. The other children, and the widow of William, were neither parties nor privies, nor was there any person before the court interested to protect their rights, or even to disclose them. Had the distribution been amongst all, George's share would have been so much less, and therefore he was interested to keep their pretensions out of view. Besides, the points now in contest were not decided upon the former occasion: The only question then was, whether the property should be divided into six equal shares, in which no doubt all the parties concurred —the question now is, whether the widow and children shall share with George the sixth part he received. The present plaintiffs, therefore, and those for whom they claim, have never been heard, their rights have never been asserted; and under such circumstances, it is contrary to natural justice, and to the law both of Virginia and this State, that they should be concluded by the decree. My opinion is, consequently, in favour of the plaintiffs.

MACAY, J. It is sufficient for the determination of this cause, that in Virginia negro slaves are considered as chattel property; Wash. Rep.——Immovable property follows the disposition of that State wherein it is situated; but the succession and disposition of movable property is not regulated by the law of the country where it is locally situated, but by that of the owner's patria or domicile; 4 Term. Rep., 184. *Hunter* v. *Potts*.

Judgment for plaintiffs.

CHARLES HAUGHTON v. NATHANIEL ALLEN.—Page 157.

A garnishee may have a writ of error on the judgment against himself, or the defendant in the attachment.

A writ of error is, in this State, a writ of right to which a party is entitled upon complying with the requisites of the Act of Assembly. (1 Rev. Stat., ch. 4, sec. 17.)

John Cox was indebted to Haughton in the sum of nine hundred and seventy dollars and forty-four cents, by note bearing date the 13th August, 1796, payable three months after date. On the 4th day of August, 1798, Allen sued out an original attachment against the said Cox, returnable to Sept. term of Chowan County Court, and the following endorsement made thereon:

"Executed and summoned in writing, Charles Haughton, as garnishee, the 4th day of August, 1798. Charles Roberts, sheriff."

At September term a judgment by default was taken against the defendant, Cox. Charles Haughton, the garnishee, was called out on his garnishment, a conditional judgment entered against him, and an order made for a writ of scire facias to issue, which accordingly issued, and a judgment final was taken against the garnishee, and a writ of inquiry awarded to ascertain the amount due on the note on which the suit was brought, and damages assessed at £572 10 5—and 6d. costs.

At April Term, 1801, of Edenton Superior Court, Haughton, by his counsel, obtained a rule on Allen to shew cause why a writ of error should not issue to remove the records and proceedings in the aforesaid suit—and the following points were made for the judgment of the court:

1st. Whether the writ of error issuing from the Superior Court, is a writ of right to issue of course upon a compliance with the requisites of the act of the General Assembly in such case made and provided—or whether it can only issue upon the assignment of sufficient errors.

2dly. Whether a garnishee in a cause can take advantage of error in the proceedings against him, by writ of error issuing from the Superior Court—and

3dly. Whether the writ of error issuing from the Superior Court is the proper remedy to correct errors in proceedings by attachment.

The errors intended to be relied upon for reversing the judgment, were: 1. That the proceedings in the cause by attachment, were not stayed according to the directions of the act of Assembly. 2. That the said garnishee had never been summoned, or brought into court, as garnishee, according to due course of law.

Hall, J. The first question that arises in this case, is, whether a writ of error will lie for the plaintiff in error who is a garnishee, to reverse a judgment obtained against himself. Whenever a new jurisdiction is erected by act of Assembly, and the court that exercises this jurisdiction acts as a court of record, according to the course of the common law, a writ of error lies on its judgment; but when it acts in a summary manner, or in a new course different from the common law, and in a manner peculiar to itself, then a writ of error will not lie: in this case the proper remedy is by *certiorari*; 1 Com. Rep., 80. 1 Ld. Raymd., 469; ibid., 6 Cow., 524. The County Court where the judgment was obtained against the plaintiff in error, in this case, is a court of record, and it does not proceed in a summary manner in a course different from the Superior Courts, when it is said that a writ of error will not lie,

except when the proceedings below have been according to the course of the common law. The reason is, that the Superior Courts proceed according to the course of common law themselves, and when an inferior court proceeds in any other way, the Superior Courts cannot judge of their proceedings by comparing them with their own. In such a case a *certiorari* may issue to remove the proceedings, in order that the Superior Court may determine whether the inferior court has pursued its authority or not. But in the present case, the same mode of proceeding is common to both courts; and on that ground I cannot see any reason why a writ of error will not lie, as well in this case as in any other. But it is said that this writ will not lie for a garnishee, because he is neither party nor privy to the judgment. The authority relied upon, is 2 Bac., 198, where it is said if a judgment be given against B. and the money of C. attached by force of a foreign attachment in London, C. shall not have a writ of error, because he comes in by garnishment by the custom, and is neither party nor privy. The judgment here spoken of must be the judgment against B. not the one against C. This idea is strengthened from the analogy which this case bears to the case of bail; they cannot have a writ of error to reverse a judgment against their principal, but they may have it to reverse the judgment against themselves, because they are parties to it. So in this case, the garnishee is party to the judgment entered against him. It is objected that the effect of a reversal of the judgment against the garnishee, will render the judgment against the defendant in the attachment a nullity, as there is no property or debt attached, but that of the plaintiff in error. If that effect is to be ascribed to the true cause, that cause will be found in the irregularity of the proceedings of the plaintiff at law; and if that would be the effect, it will be an effect proceeding from himself. I think, therefore, a writ of error will lie for a garnishee to reverse a judgment against himself. The next question to be considered in this case, is whether a writ of error issuing from the Superior Court is a writ of right, to issue of course upon a compliance with the requisites of the act of the Gen-

eral Assembly, passed in 1777, ch. 2, sec.—; or whether it is only to issue upon the assignment of sufficient errors. It is said for the plaintiff in error, that a writ of error is a writ of right—2 Salk., 504—but what is the legal substantial import of that expression? I think the security of the citizen under that writ would not be impaired or lessened, by understanding it to mean, that the party praying it shall have the proceedings in which error is assigned, examined by the Superior Court. This, I take it, is the true substantial right and benefit claimed under that writ. County Courts cannot correct errors in their own proceedings. When a writ of error is applied for, then it is a matter of right to have it granted for that reason. In England it is frequently applied for, when it is a thing of course to grant it, and that for the same reason: 1 Richardson's Practice, 327. 1 Attorney's Practice, 378. But if application is made for the allowance of it to the same court that is empowered to correct the error, may not that court determine upon the merits of the errors assigned, upon a motion to allow a writ of error, as well as at any subsequent court, after the writ of error shall have been allowed? Our act of Assembly requires that the errors shall be assigned before the writ shall be allowed, and that the opposite party shall have ten days, previous notice of the application intended to be made for it. Why is this required, unless it is for the purpose of putting it in the power of the court to determine upon the merits of the errors assigned, and giving the opposite party an opportunity to oppose the allowance of a writ of error? In England, generally, the errors were not assigned till after the allowance of the writ; and then the plaintiff in error had a *scire facias ad audiendum errores* against the defendant. But in this case, if the matter assigned for error appeared to the court to be no error, nor colour for error, it would not grant a *scire facias ad audiendum errores*; 2 Bac., 207, 6th edit., in a note. Surely, if the court is possessed of the merits of the case, it can determine as well upon them before as after the allowance of the writ of error. What is the consequence of the contrary practice—a party, without even the

shadow of plausibility, may apply for a writ of error, and have it allowed, and thereby delay his creditor, although he has not the smallest prospect of succeeding in reversing the judgment. This is the inconvenience that, I think, the Legislature intended to guard against, when by the act of 1777, ch. 2, they require that the errors shall be assigned, and the opposite party notified of the time when the writ of error will be moved for. It is said that the words of the act are, that the Superior Courts "shall have power and authority to grant writs of error," and that they have no discretion to exercise. When we view the whole section, and see that errors must be assigned, and notice given the opposite party, &c., I am led to make a different conclusion, and think that the Superior Court has a power to refuse it. Other writs, it is said, are of right—Why? Because the merits of the plaintiff's pretensions to the thing for which the suit is brought, cannot be judged of or determined upon by the person to whom the application is made for it; nor before the writ is returned, and the pleadings made up. I am therefore of opinion, that when an application is made to the Superior Court for the allowance of a writ of error, that that court has a power to refuse the allowing of it, in case the errors assigned appear to them to be insufficient. As I am alone in this opinion, it will be unnecessary to give any opinion respecting the sufficiency or insufficiency of the errors assigned upon the present motion, made for the allowance of a writ of error.

Johnston, J. The writ of error in England is acknowledged to be a writ of right; and is so in my opinion in this country, on the plaintiff in error complying with the requisites called for by the act of Assembly; and the court have no right to decide on the errors assigned, till the record is before them, which cannot be till certified by the return of the writ. In England the writ of error is returned into court before the errors are assigned—upon assignment of errors, the plaintiff prays a *scire facias ad audiendum errores*, which the court sometimes refuses, if the errors assigned be not thought sufficient; but the record is then

before the court, and they judge from the face of the record. The assignment of errors, and notice to the defendant, required by our law, is in order that he may be prepared to proceed *instanter* on the return of the writ, to a discussion of the errors, in order to prevent delay, by proceeding as they do in England by *scire facias*.

The garnishee is party to the judgment, because immediately affected; it binds his property, which may be immediately taken in execution in consequence of it.

The case in Bac. Abr., title error B., page 198, is not warranted, by Broke's Abr., 187, to which it refers. In Bro. Abr., 286, C., "it is said by some, the garnishee in London, upon foreign attachment on the custom, may have writ of error, and the plaintiff in attachment in another's hands may; for the judgment is not only against the garnishee, but the defendant also, that the other shall be discharged against him, which is the extinguishment of the debt of the defendant against the garnishee;" and cites the Year Book 22d Ed. 4, 31. This is all I can find in Broke applicable to the subject; and serves to shew that the garnishee has always been considered a party to the judgment, and for that was entitled to a writ of error.

I am not acquainted with the manner of proceeding on foreign attachments in London, nor do I consider it material to be known, as our attachment is not founded on that custom, nor in any manner dependent on it, but arises out of the act of Assembly: we must therefore be governed by the rules there laid down, and the principles arising from them. From these it appears to me, that the judgment against the defendant, and that against the garnishee, are so connected, that the one cannot exist without the other; for unless the plaintiff find property in the hands of the garnishee, he cannot obtain judgment against the defendant; and unless he obtain judgment against the defendant, he cannot seize his property in the hands of the garnishee. So that the natural consequence of the reversal of a judgment against the defendant on attachment, would be, that he would have a right to demand and recover the money or other property,

which, by that erroneous judgment, had been condemned in the hands of the garnishee. Again, if the judgment against the garnishee is reversed, there is then nothing to support the judgment against the defendant, which must fall of course. Thus it would appear that the two were but different parts of the same, and each part essentially necessary to the support of the other.

Judges MACAY and TAYLOR agreed with Judge JOHNSTON in omnibus.

Writ of error allowed.

JOSEPH TAGERT v. JORDAN HILL.—Page 164.

Where a sheriff has levied an execution on goods, and upon an injunction from a Court of Equity being served on him, had re-delivered the goods, *it was held*, that he was not liable to the plaintiff, though no security had been given for the injunction.

In a hard action, where the jury have found for the defendant, whose conduct has been *bona fide*, and the practice under which he acted as a public officer has been general, though perhaps not strictly consonant to law, the court will not grant a new trial.

This was an action on the case brought in Newbern Superior Court of Law, and the jury found a verdict for the defendant—the plaintiff moved for and obtained a rule to shew cause why a new trial should not be granted—and the following facts were agreed by the counsel of the parties:

1. That the plaintiff, Joseph Tagert, obtained a judgment against Anthony Walke, of Franklin county, for £ ; upon which judgment a writ of *fieri facias* was issued and delivered to the defendant, who then was sheriff of Franklin.

2. That the defendant, by virtue of said writ of *fieri facias*, took possession of property to the amount of £ , consisting of a store of goods.

3. That Anthony Walke obtained an injunction against the plaintiff's judgment, which was served upon the defend-

ant, who thereupon restored the goods which he had taken to Walke.

4. That Walke's injunction was dissolved upon Tagert's answer, but Walke had removed himself and property out of the State.

Woods, for the plaintiff. The plaintiff, through the misconduct of the defendant who was sheriff of Franklin county, has lost his debt, and the jury which tried this cause, have done him injustice in finding against him. When the writ of injunction came to the defendant's hands he was bound to stop the sale: which, but for that, he would have made. A supersedeas and injunction do not authorize the sheriff to *re-deliver* the goods. Whenever a seizure is made, the plaintiff then must look to the sheriff for his debt—if he has begun execution, he may proceed to sell, and his doing so cannot be considered a contempt.

Haywood, for the defendant. The question in this case is, whether the sheriff ought to have re-delivered the property or not. There is such a general rule, that a sheriff, on a supersedeas, is not restrained from going on to sell; but this rule does not hold in its application to injunctions. 1st. It never was the law in England. 2dly. It never was the law of this country:—and admitting it may be the law in England, yet general custom proves that it never was in use in this country. But should both of these grounds fail, then I contend that the writ issued by the judge, warranted the sheriff in re-delivering the goods.

Upon enquiry, I find that the rule which prevailed here before the revolution was, that whenever an injunction issued, a bond was executed by the party obtaining it, conditioned to perform the final decree which should be made in the cause; this was filed in the chancery office, and was accepted in the room of the money, which, by the English practice, must be deposited when the injunction is obtained. Whenever this bond was given, it would be highly unjust to sell the goods of the debtor: and if, in England, the goods were restored upon the money being deposited, then it will result that in this country the goods should be restored

upon the filing of the bond. The reason why the bond is accepted here in lieu of the money, is, that in England money is more plenty than in this country; and the plaintiff at law is rendered equally safe by the filing of bond with good security, as if the money was deposited.

The practice since 1782, has been uniformly to restore the goods, from a belief that the sheriffs entertained, that the judge who granted the injunction had done his duty by taking bond, or requiring the money to be deposited.

Some years ago, Judge Spencer granted an injunction, under which the sheriff restored a number of negroes, levied upon to satisfy a very considerable demand. The negroes were removed, the injunction was dissolved, the plaintiff at law completely lost his debt, and the conduct of the sheriff who restored the negroes, was considered to be conformable to law and general usage; and no lawyer who was consulted, would advise bringing a suit against him.

Another case, which will serve to shew that it was held to be the duty of the sheriff, upon being served with an injunction, to restore the goods, is that of Alexander Joice, former sheriff of Rockingham county, who refused to deliver the goods upon a Judge's *fiat* for an injunction, although no writ of injunction had then issued, and sold the property. For this, he was indicted in Salisbury Superior Court, and convicted of *disobeying the Judge's order.* This case formed a public adjudication, and served as notice to all sheriffs who might be placed under similar circumstances.—I have reason to think that this decision was not strictly conformable to law; yet it has established a practice which ought now to be adhered to.

The rule then in England, that the sheriff is bound to go on to sell, is counteracted by the practice in this country. —How would a sheriff act, if he cannot sell?—in a great variety of instances he could not keep the goods—if he is not bound to sell, he is not bound to keep the goods; and the consequence is, that the goods must be restored to the complainant.

If, in England, an injunction be applied for after verdict,

the money must be deposited before it can go; C. Cancel., 447—same doctrine, 2 Ch. Ca., 4; 2 Bro. Ch., 185. And from these cases it clearly appears, that if the deposit is made, the goods are to be restored.

Suppose the sheriff executes property which dies in his hands, he may levy again—the first service does not discharge the debtor; and this proves that the rule is not true in the extent, as laid down by Mr. Woods. Whatever the law on this subject may be, the sheriff is bound to obey the precept, to follow its words, to rely on the Judge, to believe that he had done his duty in taking a proper bond, and not to enquire into the legality of the writ. The words of the injunction are: "You are to forbear and desist from carrying the judgment into effect." If he has levied, this restrains him from selling—if he cannot sell, he is not bound to keep them; and the complainant is the only person entitled to the possession of them.

Baker, on the same side. If the law were otherwise than as laid down by Mr. Haywood, the greatest injustice would be produced. Suppose the case of one imprisoned on a writ of *capias ad satisfaciendum*, who obtains an injunction; unless he is restored to his liberty he gains but little; indeed, he may, according to Mr. Wood's construction, put on the words of the injunction, be continued in confinement until he can procure a final determination of a tedious suit, notwithstanding his claims to relief are strong and undeniable. But if the party imprisoned, upon obtaining an injunction, be entitled to be restored to his liberty, then is the complainant also entitled to the possession of his goods, when he has obtained an injunction—both of which practices are conformable to the general usage of the country.

Let us enquire how this case stands between the plaintiff and the defendant—it is a question of loss. The goods levied upon were not at most worth more than £140 or £150—either the plaintiff or defendant must lose it. This is a hard action, and one that ought to be considered *stricti juris*, and not to be favoured. The jury, however, have found a verdict for the defendant. *Justice* does not require that the

verdict should be set aside, nor that the defendant, who it is admitted acted uprightly and without fraud, should pay the debt out of his own pocket.—I therefore hope that the rule will be discharged.

Woods, in reply.—No case can be found where the property was restored, although the money was deposited. If a sheriff has money in his hands, and he is served with an injunction, he is bound to retain it, and has no authority to restore it. The sheriff is not to go back to enquire what was the practice previous to the year 1782; and as it is well known that no bonds to secure the principal sum have been taken since that time, greater caution is required for the sake of creditors. Does the injunction authorize the sheriff to *recede?* surely not—it only authorizes him to stop; and certainly there is a material difference.

I cannot suppress the astonishment I feel in hearing of the indictment of the sheriff of Rockingham—to my mind, the conduct of the Attorney General, in preferring an indictment against him for such a pretended offence, was much more irregular, than that of the sheriff who disobeyed the order of a judge not directed to him, but to another; and his fate ought to excite our compassion, rather than furnish a general conclusion.

This is not such a case as comes under the general rule of hard actions, where new trials are refused. The sheriff ought to be informed what his duty was—if he did not think it worth while to seek for information, he ought to abide by the loss.

Hall, J. It is said in this case, in argument for the defendant, that before the revolution it was the practice of the courts of equity, upon granting injunctions after verdict, to direct bond with security to be taken for the amount of the sum for which the injunction was granted; and this practice was substituted in the room of the practice in England, which in such cases directed the money to be paid into court. The act of 1782, ch. 11, declares, that the courts of equity in this state shall possess all the powers and authorities that the court of chancery, which was formerly held in

this State under the late government, exercised ;—so that if such were the practice before the revolution, it was the practice at the time when the injunction in question was granted ; and the property seized by the defendant, as sheriff, and restored to Walke by him upon being served with the injunction, stood in the same situation, as if the money for which the injunction was granted had been directed to be paid into court. If the money which the plaintiff claimed, had been really paid into court, I see no good reason why the property levied upon might not have been restored. The belief that the practice of taking bond, &c., as before spoken of, did exist before the revolution, derives some of its support from the circumstance that money at that time, in this county, was not so easily procured as in England, and of course directions to make deposits in court, could not be so easily complied with ; and also from the circumstance that such a practice has prevailed for some years at least since the revolution—and sheriffs, as far as I have observed, have conformed themselves to such a practice. If there had been a direction to stay the property levied upon in the hands of the sheriff, perhaps the case might have been different—it is not reduced to a certainty what the practice in such cases was before the revolution. I am glad, however, that this case can be decided on another ground. It is not pretended in this case the defendant, in any respect acted a fraudulent part ; he acted as every sheriff acted in a similar situation for a considerable time past. The case has been fairly examined by a jury, who have found a verdict for the defendant—it is a hard action. For these reasons I am not for granting a new trial.

Johnston, J. In the case, *Tayert* v. *Hill*, although in England, agreeable to practice in that country, the sheriff is bound to keep possession of the goods, and may even proceed to sale ; which I suppose, in case the goods are of a perishable nature, is the usual practice. It is true, there is no positive law in this county to justify the sheriff in deviating from the practice in England : But the constant practice in this country, as far as I know, has been, that the

sheriff on being served with an injunction, has in all cases delivered up the goods to the defendant; and no one instance occurring to me that an action has been brought against a sheriff for so doing, though cases where the plaintiff may have suffered a loss, as in the present case, must necessarily have taken place, it is not a matter of surprise that the sheriff should think himself justified in acting as all others heretofore have done in like cases.

In England there is no positive law in this case more than in this country—it depends on the practice of the courts, sanctioned by judicial decisions; and the only difference is, that in this country though the practice in this country has been uniformly different, it has passed *sub silentio*, and not sanctioned by a decision of the courts. If this will not justify the sheriff who acts agreeable to this practice, *bona fide*, without fraud, collusion or corruption, it will go great lengths to excuse, and had, no doubt, great weight with the jury who found in his favor—and this appears to be a hard action, and not to be maintained but upon principles *stricti juris*, on a practice not hitherto in use in this country. I am not disposed to disturb the security which the defendant has in a verdict; therefore I am of opinion that no new trial should be granted.

Macay, J. What was the practice of the sheriffs in the courts of chancery, under the former government, I know not, nor have I had it in my power to get any information, except from those gentlemen who had practiced in them—the sheriff's returns being "stayed by injunction." It seems that on obtaining an injunction, the complainant always filed his bond in the office; this bond was for costs: but whether the sheriff restored the goods he had levied on, upon being served with the injunction, I cannot say. I have been informed it was; and therefore the practice began with the sheriffs, under the present court of equity, to restore the property levied on, when served with an injunction. If any such practice has ever prevailed, I do not remember it. It could not have been general, or some case must have come within my observation. There can

be no doubt that, under the laws of England, the sheriff might, after he had levied, sell the goods, notwithstanding an injunction had issued and been served upon him—he could not restore the goods without making himself liable for their value. The judges who tried this cause, were divided in their opinions. Judge MOORE held that the sheriff, by restoring the goods he had levied on, made himself liable to the plaintiff for their value. Judge HAYWOOD held that the sheriff had done nothing more than what was justifiable, under the practice of the former court of chancery, as well as the present court of equity. The jury had the whole matter before them, and found for the defendant. Either the plaintiff or the defendant must loose the value of the goode levied on, Green being insolvent. The practice being very doubtful, and this being a case *stricti juris*, I will not deprive the defendant of the benefit of the verdict in his favor.

NOTE.—See on the second point, *Allen* v. *Jordan*, 2 Hay. Rep., 132, and the cases referred to in the note.

WILLIAM GILES'S HEIRS v. WILLIAM GILES'S EX'RS.—Page 174.

A will of real estate in writing may be revoked by parol; but the words of revocation must denote a present intention to revoke. Therefore where a devisor directed the person with whom his will had been deposited to burn it, who refused to do so, but said he would deliver it to the testator to be by him disposed of as he pleased; but it was not delivered back however, and the testator afterwards said the will should stand, *it was held* that there was no revocation.

A revocation of a will of real estate carried completely into effect cannot be revived by any subsequent declaration by parol.

William Giles, of the county of Rowan, made his last will and testament in writing, in which he devised real and

personal estate. The will was attested by three witnesses, and placed in the hands of Montford Stokes for safe keeping. Some time afterwards William Giles directed Stokes to *burn the will*—Stokes said he would not, but would deliver the will to him (Giles), and he might burn it if he pleased. This conversation passed in the presence of three witnesses. The will, however, was not delivered by Stokes to Giles, nor was it burned by Stokes. After this conversation, Giles said that he had made his will, and it *should stand;* that he had made provision for his wife—that she was to have one-half of his estate. This conversation passed between Giles and three or four other persons at sundry times, and had relation to the will in the hands of Stokes. Then Giles died, leaving said will in Stokes' possession.

The executors named in the will obtained the will, and offered it for probate in Rowan County Court.—This was contested by the heirs of Giles, upon the ground that the will had been revoked by the parol directions given by Giles to Stokes to burn the will. An issue of *devisasavit vel non* was made up and tried. There was an appeal to the Superior Court for Salisbury district, and the issue was tried at March term, 1801, and found in favor of the executors. A new trial was moved for, upon the ground that the court had misdirected the jury, and these points reserved:—

1. Can a will in writing, duly executed, and published in the presence of two subscribing witnesses, whereby lands and personal estate are devised, be revoked by parol; the will being made since the Act of Assembly repecting Wills?

2. If such will may be revoked by parol; can it not be republished by parol?

If such will has not been revoked by parol, then judgment for the executors.—If such will can be revoked by parol but may also be republished by parol, then judgment for the executors. If the will has been revoked by parol, and cannot be republished by parol, then judgment to be

entered, that the devise of lands in the will is void, and judgment for the will as to the personal estate.

By the Court. It appears that parol revocations of wills in writing, have, in some instances, been held good in England, before the statute, 29, Ch 2, but this must depend upon the particular circumstances of the case ; such as, that it was the intention of the testator to die intestate ; and that the revocation was complete and conclusive, and not dependent on any subsequent act.—And these circumstances are all proper for the consideration of the jury.

There is a case reported in Tothill, 286, where it is said to have been ruled, that a will in writing should not be revoked by parol ; and this is before the statute of frauds. But the facts are not particularly set forth.

The case cited from Perkins, § 479, in Viner, title devise, is a much stronger case than the present, where a man had made his will and two years afterwards made another will. On his death bed, being dumb, both the wills were handed to him, and being desired to deliver that back which he intended should stand as his will ; and he handed back the will which was first executed : and this was established as his after his death.

The case of *Cott* v. *Dutton*, 2 Sid., 2, 3, where the testator declares his first will, and not his last should stand, and the first will had the preference.

In looking into the last case, there appears circumstances unfavorable to the execution of the second will, though it was to the benefit of his own daughter ; the first in favour of a more distant relation—both the wills are said to be duly published. In both these cases, though the first will was completely revoked by the publication of the second ; yet not being cancelled or destroyed, they were restored by the parol declaration of the testator, which could not have been done, if they had not actually cancelled.

In the case now under consideration, it appears the testator did not intend to die intestate ; inasmuch as he declared at the same time that the devise to his wife should stand

good. He did not consider the revocation complete until the will was cancelled and destroyed, and accordingly gave order to Mr. Stokes, the person who held the will, to cancel and destroy it; which that person refused to do, but informed the testator that he would deliver it to him, and that he might himself cancel and destroy it. The testator never took his will out of the hands of Stokes, nor at any time demanded it for the purpose of cancelling or destroying it; but some time after knowing his will to be still in existence, and in the hands where he had placed it, declared that it should stand as his will.

Taking all the circumstances of this case into consideration it appears to us, in the first place, that Giles did not intend to die intestate; in the second, that he did not consider the revocation complete until the will was cancelled or destroyed; and lastly, as he never called for the will to cancel or destroy it, that it was his intention that it should continue as his will as appears by his subsequent declaration. Had he considered his first declaration a complete revocation, without the destruction of the will, and that the paper in the possession of Stokes was not valid and unrevoked, the presumption is, that he would have made a new will to the same effect: It would therefore be contrary to every principle of equity to adjudge that a man died intestate, where, from a fair and equitable construction, the intention of the testator appeared otherwise; and where that intention can be supported without violation of any principle of law or equity. We are therefore of opinion, that the will is good to every intent and purpose.

Had the revocation been completely carried into effect, and the will cancelled, it could not have been revived by any subsequent declaration by parol.

NOTE.—The law as to parol revocations of written wills of real estate ha since been altered by the act of 1819 (1 Rev. Stat., ch. 112, sec. 12.)

DEN ON DEM. OF WILLIAM FARIS and wife, et al. v. SAMUEL SIMPSON.—Page 178.

The proviso to the 6th section of the confiscation law of 1779, ch. 5, did not vest any title in the wife and children of absentees.

Under the confiscation law of 1776, titles were not divested out of the persons coming within its operation without proceedings in the nature of an office found.—But the second confiscation act of 1779, the estates of the persons named therein were divested by the force of the act itself.

This was an action of ejectment, brought in Newbern Superior Court, and the following special verdict was found: —"That the premises in question were granted to Robert Palmer in the year 1759—that 1771 he went to England—that he attached himself to the enemies of the United States, during the war between Great Britain and the said United States, and did not return till the year 1785—that William Palmer was in this State in the year 1779, and under her protection, having been in the same from the year 1769, and remained here till the revolutionary war; and that he is the eldest son of the said Robert.—That he, the said William, made his will, and devised the premises to the lessor of the plaintiffs, and died at New York in 1786.—That in the year 1787, the commissioner of confiscated property sold the premises to the defendant, as confiscated property.—That the wife of Robert Palmer, in the year 1771, went with him to England, and has never returned to this State.—That the said Robert Palmer is the person named in the confiscation acts."——The jury pray the advice of the court, and if, &c.

JOHNSTON, J. Some years before the American revolution, Robert Palmer, who was seized and possessed of the premises in question, removed to England, and settled in London, where he continued to reside to this time, leaving in this country his eldest son William Palmer, who became a citizen of this State, and since the revolution died, in the

lifetime of his father, leaving the plaintiff Mary his widow, and several children. By his will, duly executed, he devised the lands in question to the said Mary, who afterwards intermarried with William Faris.

By an act of the Legislature, passed in their session of Nov., 1777, ch. 17, it is enacted, that "all the lands, &c., of which any person was seized, or possessed, or to which any person had title on the 4th day of July, 1776, who on the said day was absent from this and every part of the United States, and who still is absent from the same, &c., and still resides beyond the limits of the United States, shall and are hereby declared to be confiscated to the use of this State; unless such person shall, at the next General Assembly which shall be held after the first day of October, in the year 1778, appear, and by the said assembly be admitted to the privilege of a citizen of this State, and restored to the possession and property which to him once belonged within the same."

The first assembly after the 1st day of October, 1778, was held in January, 1779, who passed an act to carry the act of November, 1777, into effect. After setting forth in the preamble that "whereas many persons who come within the description of the aforesaid act, or some one of them, have failed or neglected to appear before the General Assembly, during the present session, and submit to the State whether they shall be admitted citizens thereof, and restored to the possession which to them once belonged; whereby all such persons have clearly, incurred and are become liable to the penalties of the aforesaid act;"—the assembly then goes on to enact, "That all the lands, &c, of every person and persons who come within, or are included within the description of the aforesaid act, or either of them, shall be, and are hereby declared to be forfeited to the State, and shall be vested in the same, for the uses and purposes hereinafter mentioned, and for no other purposes whatsoever."——Commissioners are appointed, and by the sixth section of the act they are directed, among other things, to let the lands, and by a proviso to that section, it is provided, "nevertheless, that the child

or children of such absentee or absentees, now in or under the protection of this State, *shall be allowed* so much of the estate of such absentee or absentees, as such wife, child or children, might have enjoyed and have been allowed, as if such absentee had died intestate in this State, or any of the United States."

Robert Palmer was one of those who did not appear before the General Assembly, and claim the privilege of becoming a citizen—Wm. Palmer was his eldest son, and would have been his heir-at-law, and entitled to the inheritance of the premises, if his father had died in this State or any of the United States. The plaintiffs claim under the proviso above recited.

In October, 1777, the Assembly passed another act to carry into effect the act passed at Newbern in November, 1777. The preamble to this act declares, that whereas, &c. (the same as in the act of January the same year) and enacts, " that all the lands, &c., of Robert Palmer, and a number of others, whose names are enumerated, which all or either of the persons aforesaid may have had on the 4th of July, 1776, or at any time since, shall be, and hereby declared to be confiscated, fully and absolutely forfeited to this State, and shall be vested in the hands of commissioners, for the purposes after mentioned."

By the 7th section of this act the commissioners are empowered to sell the lands, &c., and execute conveyances to the purchasers.

By the 16th section of the same act, the act of January, 1779, and every clause of it is repealed and made void, any law to the contrary notwithstanding.

The defendant became a purchaser under this act, or the act passed in April, 1782, ch. 6, nearly to the same purpose as the above, and obtained a conveyance from the commissioners, duly executed, under which he claims.

It is first to be considered, by what authority the Assembly assumed a power to seize upon and appropriate to the public or any other use, the lands of individuals. For

this information, it is necessary to have recourse to the fundamental principles of our government, as laid down in the bill of rights and constitution, from which alone they derive all the powers and authorities which they have a right to exercise over the persons and property of the citizens, either collectively or individually.

The bill of rights, section 25, after describing the boundaries of the State, declares, "that the territories, seas, waters and harbours, within the boundaries therein delineated, are the right and property of the people of this State, to be held in sovereignty, &c."

To this general declaration there are some reservations and exceptions.—Of these it is only necessary to attend to the third proviso, as follows: "And provided further, that nothing herein contained shall affect the titles or possessions of individuals holding or claiming under the laws heretofore in force, or grants heretofore made under King George III., or his predecessors, or the late lords proprietors, or any of them."

By the declaratory part of this section, the people of this State assume to themselves, collectively, the right of property of all the lands within the boundaries of the State, not heretofore appropriated; and thereby disclaiming all right to interfere with the right of property heretofore vested in individuals, in the manner described in the proviso above. It is evident, that by this proviso the titles of individual citizens of this State are secured to them, and placed out of the power of the collective body of the people; and consequently no act of their representatives in the General Assembly, could divest or impair the titles which they held, under royal or proprietory grants, before the revolution, or the existence of our present government; and any act which might be unadvisedly or arbitrarily made to that purpose, would be a mere nullity, and would fall prostrate before the bill of rights which is paramount to the Acts of the Assembly, and exercises a controuling power over them, as often as they exceed the bounds prescribed to them by that instrument, which should ever be held sacred and inviolable, as the

best security of our civil rights, against the assumption of tyranny and despotism; such an act should not and ought not to have any weight to influence a decision in any court of judicature.

It is then to be considered how far this proviso or saving can have any influence or tendency to establish or secure the titles of others than citizens, from the assumption and appropriation of the Legislature.

The declaratory or enacting part of the clause regards the citizens or body of the people collectively, within the boundaries therein described, and confers no territorial rights except to them; the saving in the proviso, is to secure to the individuals of that collective body of the people, their separate and individual titles to their lands, but cannot, as I apprehend, mean or intend to secure titles to lands, or vest interests in individuals, not individuals of the collective body of the people of this State, but aliens and foreigners who had never become parties to the compact on which our government was formed, nor residing within the limits of its territory.

There were, however, at that time, certain persons, our former fellow subjects, inhabitants of the State, who had not acceded to the revolution, and who never became parties to the social compact, who by the law of nations had, notwithstanding, a right to sell and dispose of their lands, and remove their property.—See Vattell, book 1, ch. 3, sec. 33. The act of April, 1777, ch. 3, delineates who are considered citizens of this State, or as they express it, "owe allegiance to the State;" and in the same act, declare it necessary that all persons who owe or acknowledge allegiance or obedience to the king of Great Britain, and refuse to take an oath of allegiance to this State, within a limited time, should be removed out of the State, allowing them to sell their lands, and remove their effects, and if not sold within a limited time to be forfeited to the State. As the persons above described were inhabitants of the State at the time of the Declaration of American Independence, and at the time when the constitution and bill of rights were adopted, they might

perhaps be considered to come within the proviso, and the titles to their lands continued to be vested in them, till they declared their election either to become members of the State, or to adhere to the royal government; which election they had a right to make, agreeably to the law of nations, (see the authority above referred to.) During that interval, they might sell or dispose of their lands; but as soon as they had made their election in favour of the old government, and by that disclaimed any connection with the government established by the new constitution, they were deprived of all the privileges which accrued from it, unless under such indulgence as might be extended to them by the Legislature, in whom, as representatives of the people, the right of disposing of the public property, under such limitations and restrictions as they thought proper, were vested.

It is now to be considered whether William Palmer, under whom the plaintiffs claim, was at any time seized, or had any title in law to the premises.

At the time of the declaration of rights, and adoption of the constitution, Robert Palmer, being an alien, could not, as I conceive, acquire or hold any rights from them—he could not have acquired a title to any lands in this State for himself—all which he acquired by purchase or descent would be vested for the use of the State, who might at any time lay her hands upon them, if he had died after that period, even before any act for confiscating his property had passed—his heirs-at-law, though a citizen of this State, could not have taken by descent, because his ancestor did not die seized; the premises having, agreeably to the principles above laid down, vested in the citizens of this State; and to entitle the heir, he must claim as heir to him who was last seized. Therefore William Palmer, and they who claim under him, to entitle them to a recovery in this case, must derive a title from the State.

The only colour of title shewn by the plaintiffs, is the 6th section of the 5th chapter of the act of January, 1779—the words are, "shall be allowed;" which seem to refer to some future act, to be executed by the State. Upon a

claim being exhibited and admitted, there is no authority delegated by the act to any one to examine the claim, and carry into effect the intentions of the Legislature—the legal estate continued to be vested in the public, and could not be divested but by an actual conveyance or transfer, directly vesting it in some individual in words of the present tense—but words such as those used in the proviso, in the future tense, cannot convey or vest the title of an estate; at most they amount only to a promise, and such a promise as in the case of a private person would not perhaps be binding in equity, as it was made without any valuable consideration. And yet, as it was made by so high and respectable an authority, and under such circumstances as it appears to me, should have been held sacred and inviolable, and most conscientiously complied with and fulfilled.

The circumstances I allude to are these: that absentees who are at a great distance, perhaps aged and infirm, might probably rest contented that their property should be enjoyed by those who would be entitled to it after their death, which they might consider at no very distant period. The act however which passed in October, 1779, having revoked the promise of the State, if it can be considered as a promise, by repealing the act of January, and declaring it null and void before any steps were taken substantially to carry their intention into effect, the claim of William Palmer was annihilated, and no longer existed either in law or equity, and the purchase under the last act stands good and valid.

Therefore I am of opinion that judgment be entered for the defendant.

If it should be considered that the words in the proviso to the 25th section of the bill of rights, saving the titles or possessions of individuals, being general, extends to secure the titles of all persons, as well aliens as citizens, who claim under royal or proprietory grants, then Robert Palmer is included within the saving clause, and was not divested of his title nor had the Assembly any right to appropriate his lands, which I do not admit; yet the plaintiffs in such case cannot recover, having derived no title from him.

Taylor, J. In order to render the opinion which I am about to deliver as perspicuous as possible, I will state the substance of those confiscation laws which relate to the present question ; the first, which was passed in 1777, comprehends three descriptions of persons :

1st. Those who on the 4th July, 1776, were absent from the State, and the United States, and continued absent when the law was passed.

2d. Those who at any time during the war attached themselves to or abetted the enemies of the United States.

3d. Those who have withdrawn themselves from the State or any of the United States, since the 4th of July, 1776, and still continue beyond the limits of the United States.

Of all such persons the property is declared to be confiscated, unless they shall at the next General Assembly which shall be held after the 1st October, 1778, appear and be admitted to the privileges of citizens, and restored to the property which one belonged to them.

The second, passed in January, 1779, to carry the former into effect, after reciting in the preamble, that many persons within the description of the first had failed to appear, declares that all the real and personal estates, of such persons shall be forfeited to the State, and vested in the same for the uses expressed in the act. The act then proceeds to direct the appointment of commissioners, and to prescribe their duties, with respect to renting the real, and selling the personal estates; and to the 6th section is added this proviso: "That the wife, child or children of such absentee or absentees, now in or under the protection of this or the United States, shall be allowed so much of the estate of such absentee or absentees, as such wife, child or children might have enjoyed, and have been allowed, if such absentee had died intestate in this State, or any of the United States.

The third act passed in October, 1779, recites that many of the persons coming within the description of the former, have failed or neglected to appear, according to the requisitions of the first act, whereby they have clearly incurred

and become liable to the penalties of the first act. The persons who have thus clearly incurred the penalties of the said act, are then enumerated; and among them Robert Palmer is specially named. The 16th section repeals and makes void the act passed in January, 1779. The 17th section reserves to the wives and widows of the described persons, who reside within the State, the right of dower, and directs that a proper subsistence should be allowed to them out of the sale of their husbands' estates, for themselves and the minor children who reside in the State. The quantum of the allowance is however to be ascertained by the Assembly. The confiscation laws subsequently passed, have no other connection with the case before the court, than being parts of one system; they may occasionally serve to explain and illustrate the intention of the Legislature. The plaintiff sets up a title to the premises under William Palmer, who, it is said, as eldest son of Robert Palmer, became seized by the operation of the proviso contained in the law of January, 1779. If under that clause, he acquired a clear and obvious title, a very interesting inquiry would arise, to ascertain how far it was affected by a subsequent repeal of the act: a question which may perhaps, on investigation, appear to be embarrassed with new and peculiar difficulties, on account of the manner in which repealing clauses are worded, almost uniformly throughout our statute book. That rights acquired, or acts done, under a statute, while it remains in force, continue unimpaired and valid, notwithstanding its subsequent repeal, is a well known principle of law; but it seems to be different when a former act is declared to be null and void. The view I have of the present case, does not require me to give any opinion on this point, though I confess that nothing short of the clearest conviction would induce me to de-de,that a title acquired by the proviso was taken away by the subsequent act: because, upon the supposition that Robert Palmer's estate was confiscated by the law of January, 1779, the proviso for his resident children is founded in the clearest principles of justice, and not forbidden by any obvious

reasons of policy. To rescue innocence from the punishment denounced against delinquency; to combine the indispensable measures of self-preservation, with a beneficent regard to the rights of humanity, were objects highly becoming the legislative character, and they have been accordingly attended to in all the laws upon this subject, though the modes have been varied according to the urgency of the times. To a greater or less degree the principle has been kept in view throughout the whole system: *peccata suos teneant auctores; nec ulterius progrediatur metus, quam reperiatur delictum.* No law provides so amply for the children as that of January, 1779; no other gives them that portion of their father's estate, which they would have inherited in case of intestacy: it would therefore be most agreeable to discover satisfactory grounds upon which to decide in favour of a title claimed under this proviso. But the right being claimed as one strictly legal, and created by a positive law, it must appear to be so to those who are required to give it judicial sanction. The principal question then is, was the estate of Robert Palmer confiscated by the act of January, 1779? If the affirmative of this question should be established, two others naturally arise in the case, viz. Whether the terms of the proviso are sufficiently operative to vest an immediate seizin in William? And lastly, if they were, then whether it was divested by that law being subsequently repealed and made void? Upon the latter question it is unnecessary for me to give an opinion, because I think no confiscation in the particular case was effected by the act. The freehold must have been divested from Robert Palmer before it could be granted by the State to William; but a legislative declaration, that a certain description of persons had incurred the penalties of the law, and that their estates were thereby confiscated, could not of itself effect a silent transfer of their property. Such an act must from its very nature, be inchoate, and fall short of its object, until the property of the persons described be seized, as having incurred the forfeiture. To determine whether a person's conduct had been such as the law intended to punish, and to ascertain what

property in consequence thereof had accrued to the public, various methods might have been devised: and probably that adopted by the act was no less effectual than any other. Whatever steps are directed to be taken for this end, should have been pursued, and in the manner prescribed. They seem essential to impart to the law its intended rigour and operation; and this will be more apparent, when the directions and different modes of proceeding are particularly examined. Commissioners are to be appointed, who are to give bond, and perform their duties under the sanction of an oath: They are to take possession of their property for the use of the State; to enter in a book the property which has came to their knowledge or possession, with the name of the former owners, and whether there are any adverse claimants; and they are to report their proceedings to the county court. If any citizen of the State, or of the United States, puts in a claim to the lands, the proceedings of the commissioners are to be transmitted to the superior court, where the question is to be finally determined. If any person having a claim do yet neglect to exhibit it before the county court, and their property is in consequence wrongfully sold, the assembly is to reimburse them. These, and other things contained in the law, were so many qualifications to the general confiscatory clause, and necessary to determine when and how they should operate. They furnish a proof that the Legislature had in view that principle of the common law, that the State can neither take nor give lands, without some solemn and authentic act, or matter of record. The requisite degree of certainty and solemnity was contemplated in the discharge of the several duties assigned to the commissioners.—It is said in Page's case, 5; Co., 53, "There are two manner of offices; one that vesteth the estate and possession of the land in the State, when it hath not any right or title before, and that is called an office of entitling as in case of purchase by an alien, &c. There is another office, and that is called an office of instruction; and that is where the estate of the land is lawfully in the State before, but the particularity of the land doth not appear on record, so that it may

be put in charge." An attainder for treason is put by the writer as an example of the latter kind; and the nature of that when examined, shews that the proceedings directed by the act in question, ought to be viewed as an office of entitling. By the English law, an attainder follows either from the judgment of outlawry or of death, in cases of treason and felony; or it is created by an act of parliament, passed for the very case. In the first instance, the forms of proceeding being regulated by pre-existent laws, require the utmost certainty and precision—in the latter, the penalties of an attainder are invariably inflicted upon the offenders by name; and that some degree of certainty is necessary in this respect, appears from Fort., 86. By whatever means therefore an attainder arises, it is a solemn and notorious act, specific in its object, personal in its direction, and not requiring the aid of other circumstances to complete a divesture.

It does not appear from the special verdict, that any proceedings whatever were had against Robert Palmer's estate under this law; and thence I think it follows, that the title continued in him until the act of October, 1779, when he was specially named, and his estate confiscated. The act itself may be regarded as a proof that the Legislature entertained the same opinion: For if Robert Palmer's estate was effectually confiscated by the first law, where was the necessity of passing another for the same purpose? If the first divested all his estate, there was nothing left upon which the latter could operate; for it seems he was absent from the country in the intermediate time. Nor is this kind of proof weakened by the supposition, that the latter act may operate upon such property as was not disposed of to William by the first, such as the dower of the wife, or the share of a child not resident. This is assuming what no reasonable construction of the act will warrant; namely, that so much of the property as was not allowed to William, as a resident child, remained in Robert. The law either amounted to a confiscation, or it did not: if it did, then two-thirds of the real, and a share of the personal

estate, were to be allowed to William; the other third of the real, and the shares of the personal, would clearly belong to the State, if there were no resident children. In either case nothing remained to Robert; for the nature of a proviso is to except something from the operation of the purview, which must otherwise have been subject to it.

After what has been stated, it would be almost unnecessary to add, that in my opinion the real estates of those persons who were the objects of the confiscation acts, were not divested by the declaration of rights—that instrument had a very important operation in vesting in the people of the State, certain rights appertaining to tenure, which were before in the king and lords proprietors; but the individual titles derived from others were not, I think, meant to be affected.

Judgment for the defendant.

Judge MACAY gave no opinion in this case, being interested in some lands claimed by the lessors of the plaintiff.

Upon the same grounds Judge HALL gave no opinion, because he had not been appointed till after the opinions of the other judges had been made up.

NOTE.—See on the second point, *Bayard* v. *Singleton*, 1 Martin's Rep., 48.

ABNER PASTEUR v. JOHN JONES, et al.—Page 194.

Where a tenant covenanted to build and leave in repair, and did build, but the houses were destroyed by fire, a Court of Equity will compel him either to rebuild or to pay the value of the buildings, and the bill may be against either an assignor or assignee of the lease, when the lessor has not consented to the assignment.

This was a case in equity, brought in Newbern Superior Court, and referred for the opinion of the Judges upon the following statement of facts, viz.:

1. Judith Pasteur, mother of the complainant, was seized in fee of a piece of land in Newbern, described in the complainant's bill, at the time of the contract hereinafter mentioned with Jones and Neale.

2. That John Jones and Abner Neale were at the time of the said contract, partners in trade, under the firm of Jones and Neale.

3. Some time before the 1st October, 1785, it was agreed between Judith Pasteur, of one part, and Abner Neale, in the name of the company of Jones and Neale, (but in the absence of Jones from Newbern) of the other part, that Jones and Neale should put upon the land before mentioned, at the expense of Jones and Neale, such buildings as the company should have occasion to use in the course of their trade; and when the buildings are completed, persons should be appointed by the parties mutually, to name a term of years for which said Jones and Neale should have the land on lease, *in consideration of their putting and leaving*, at the expiration of the term, *the buildings upon the land.*

4. That in pursuance of such agreement between Judith Pasteur and Abner Neale, Neale put upon the land, at the expense of the company, buildings of the value of £400, and a term of seven years was named by persons mutually chosen as aforesaid.

5. That in further pursuance of such agreement between Judith Pasteur and Abner Neale, the said Judith, on the 1st October, 1785, executed the lease hereto annexed.

6. That the company of Jones and Neale occupied the said lands and buildings for the purpose of carrying on trade and merchandise, from the date of the said lease till the 30th day of April, 1787; when Jones, for a valuable consideration, assigned his interest in the lease to Abner Neale.

7. That Abner Neale, on the 9th day of August, 1787, for a valuable consideration, assigned all his interest in the lease to Richard Ellis.

8. That said Richard Ellis, by himself and others his tenants, occupied and enjoyed the premises from the last

mentioned assignment till about the 28th Sept., 1791, when said buildings were consumed by fire,

9. That Richard Ellis died in the year 1792, and George Ellis obtained administration on his personal estate.

10. That Judith Pasteur, in the month of July, 1786, in consideration of the natural love and affection which she had and bore to her son, the complainant, assigned all her interest in the premises to him.

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The clause in the lease by which the complainant insisted the defendants were bound to leave the buildings, &c., on the land is as follows:—"And the said Jones and Neale do, for themselves, their heirs, executors, administrators and assigns, covenant and agree to and with the said Judith Pasteur, her heirs, executors and administrators, that they, the said Jones and Neale, their heirs, executors, administrators and assigns, will leave all houses, out-houses, fences and other improvements, that are now on the said part of a lot or parcel of land, or that they or any of them may erect hereafter on the same, in good tenantable order and repair, under the penalty of paying double the value thereof to the said Judith Pasteur, her heirs, executors, administrators or assigns; and that they will not move off the premises any house, out-house, fence, or other improvements which they have already built, or may hereafter build thereon, under the like penalty."

Woods, for the complainant, cited Dyer, 33. Alleyne's Reports, 26, 27. 1 Fonblanque, 366.

Haywood, for the defendants, cited 1 Dallas, 210; Ambler, 619; 1 Salkeld, 199.

HALL, J. It is expressed in the agreement between Judith Pasteur and Abner Neale, amongst other things, that said Jones and Neal "shall put and leave at the expiration of the term, the buildings upon the land." In the lease from Judith Pasteur to Jones and Neale, there is a covenant on the part of the lessees, "that they, their heirs, executors, administrators and assigns, will leave all houses, &c., that

are now on the said lot, &c., or that they or any of them may erect hereafter on the same, in good tenantable order and repair." The lessees accepted of the lease, and enjoyed the premises under it. I am of opinion that the lessees are liable under that covenant, and that the rule of law is well established, that where a lessee covenants to repair the buildings, and so leave them, binds him, and makes him liable in case they are burnt down by fire, &c. 2 Com. Rep., 627, 1 Term, 310, 710—and that in the present case the complainant is entitled to the sum of £400, the value of the houses, with interest thereon, from the expiration of the lease till paid.

Johnston, J. The question in this case is, whether the lessees are bound to perform their covenant, namely, to leave all such buildings on the lot as they should erect on it during the term in good repair at the expiration of the term; and whether they may be discharged from this covenant by an inevitable accident, intervening before the expiration of the lease, which wholly destroyed the buildings.—It is a doctrine laid down in all the books on this subject, that all persons are bound to perform their covenants voluntarily entered into, *under all circumstances.* The distinction appears to be, that where a duty is imposed by implication of law, the non-performance is excused by inevitable accident—if by a voluntary and express covenant for a valuable consideration, it is otherwise; because if it was intended that the lessees should avail themselves of such excuse, it would have been excepted in the contract, as is usual—Com., 627; Dyer, 332; Alleyne, 26; 1 Fonblanqe, cases referred to in notes, 361 to 366.

This is the general doctrine—but this is a much stronger case than any stated in any of the books; for here the houses erected on the ground previous to fixing the time for which the lease should continue, were valued at £400; and it was at the same time considered that the use of the ground for seven years was equivalent to their value. The lessees have had the use of the land for seven years; it is therefore in my judgment equitable that they should fulfil

their part of the contract, either by leaving the buildings which had been erected in repair at the end of the term, or paying the plaintiff so much as will enable to erect similar buildings.

With respect to the question against whom shall the plaintiff have redress—whether against the lessee or assignee? I am of opinion that the lessor has his remedy against the lessees in the first instance, as the assignment was not made with his consent or approbation; but is not precluded from proceeding against the assignee at his election.

Taylor, J. The spirit of this contract was, that the lessor, at the end of the term, should have the lot restored, improved in its value by the amount of the buildings which Jones and Neale should erect. These were to be such as suited the convenience of the company, and were to be kept in repair, and left on the lot. The consideration of the actual expense in building, and the possible increase of expense in reparation, and leaving the buildings on the lot, was the privilege of enjoying the lot for seven years: in other words, an agreement on the part of the lessor that, for the time mentioned she would forego, and that Jones and Neale might enjoy all the benefit of the possession. This mode of compensation was fixed on by the parties in lieu of annual rent; but the premises being destroyed by fire, before the end of the term, the defendant on that ground claims an exemption from the performance of the covenant; not because the terms of agreement are not sufficiently extensive, taking them in their common signification, but because it was not contemplated by either of the parties, that the lessee should rebuild after a destruction by fire. Were the question to be decided at law, a series of concurrent authorities, ancient and modern, would not permit us to doubt what the true rule was. Clearly the tenant is bound to pay the rent, notwithstanding the destruction of the premises, in respect of which the rent is reserved. Indeed the covenant to pay rent and to repair, stands upon the same footing in that respect; and in both, the liability of the tenant flows from the general rule which has been stated.

No case has been produced, wherein equity has relieved further than to discharge the party from the penalty, which is a thing of course; and this does not appear to me to be such a case as would warrant the court to make a precedent. I am therefore of opinion that a decree should be made against the defendants for the principal sum, with interest, to be computed from the expiration of the lease.

Macay, J. The lease and covenants were executed on the 1st October, 1785—Jones and Neale continued in possession of the premises until the 30th April, 1787, when Jones assigns his interest to Neale for the consideration of £300. On the 9th August, 1787, Neale assigns the remainder of the term to Richard Ellis for the consideration of £400. Richard Ellis and his tenants occupied the premises until the 28th Sept., 1791, when the buildings on the premises were consumed by fire. The buildings on the first of October, 1785, were of the value of £400. Jones and Neale agreed and covenanted that those buildings should be left on the land at the expiration of the term, which would end on the first of October, 1792. Jones and Neale, by themselves and their assigns, had possession of the premises near six years, and on the 9th August, 1787, had between them received £700; and now they say they ought not to re-build the houses; because they were consumed by fire before the expiration of the term. Where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and has no remedy over, there the law will excuse him; but where the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity; because he might have provided against it by his own contract. Therefore if the lessee covenants to repair a house, and it be burnt down by lightning, yet he ought to repair it—Alleyne, 27—He must rebuild it—Com. Rep., 632; 2 Durn. & East, 550. The leaving the houses on the premises in good tenantable order and repair at the end of the term, was all the rent the plaintiff was to have for his term; and therefore Jones and Neale, by their covenant, have

bound themselves to leave the houses on the premises in such order and repair at the end of the term, under the penalty of double their value. As the lessee has the advantage of casual profits, so he must run the risk of casual losses, and not lay all the burthen on the lessors. The houses having been built as a consideration for the term, and burnt down before the expiration of the term, and not rebuilt before the expiration thereof, the plaintiff receives nothing. The case cited from 1 Dall., 2—10, for defendants cannot bear upon this case. There it was the opinion of the court that the rent must be paid, because of the express covenant to pay it; and that the whole burthen should not fall on the lessors. The other case from Amb., 619, is where accidents by fire were expressly excepted in the covenants.

Let judgment be rendered for the plaintiffs against the defendants for £400, with interest from the 2d October, 1792, until paid.

DEN ON DEM. OF THOMAS SUTTON and wife v. JONAS WOOD.—Page 202

A devise by a testator to his two sons, A. and B. in fee, and that if either of them should die without lawful issue begotten of their bodies, his son C. should have the lands of the one so first dying, is too remote, and the limitation to C. is therefore void.

Where a testator after several bequests of specific chattels to his wife, proceeded thus: "also all the remainder of my estate whether within doors or out, that was not before given away—all the residue of my estate and every part thereof, I give to my wife S. W., she paying all my just debts and funeral charges, &c., to her and her heirs forever:" *it was held* that his real estate passed to his wife in fee.

This was an action of ejectment, brought in Hallifax Superior Court, to recover possession of a certain tract or parcel of land, lying in Northampton county, and the following special verdict found:—That Jonas Wood, father of the

defendant, being seized in fee of the lands in question, on the 17th day of August, 1790, duly made and published his last will and testament in writing, and among other things devised—"Item, I give and bequeath to my son Cullen Wood, my plantation and lands, by the name of Mall's Ridge, bounded as follows: Beginning at the head of the Hog-pen Branches, in Joseph Wood's line, at a blazed tree; thence along a line of blazed trees to the Great Pocoson, to a pine; thence along a line of blazed trees to the head of Robertson's branch; then down the run of the said branch to Lemuel Burkett's line, to Godwyn Cotton's line; thence along said Cotton's line to Joseph Wood's line; thence along the said Joseph Wood's line to the first station, containing four hundred acres, be the same more or less, &c. Item, My will and desire is, that if either of my two sons, Cullen Wood or Lawrence Wood, should die without lawful issue begotten of their bodies, that my son Jonas Wood shall have the lands of the one so first dying; and in that case as aforesaid, do give and bequeath the aforesaid lands of the one so first dying, unto my son Jonas Wood, to him, his heirs and assigns forever." And afterwards departed this life, and the said will was duly proved and recorded. That Cullen Wood, the devisee under said will, entered upon and was seized of the lands in question, agreeable to the devise thereof to him in the said will; and being thus seized, on the 7th day of May, 1792, duly made and published his last will and testament in writing, in the words and figures following:—"Item, I give and bequeath to my wife Sarah, all my horses, cattle and sheep, that was not before given away, and the remainder half of my growing crop. Also all the remainder of my estate, whether within doors or out, that was not before given away—all the residue of my estate, and every part thereof, I give to my wife Sarah Wood, she paying all my just debts and funeral charges, &c., to her and her heirs forever."—And afterwards departed this life without issue, leaving his brother Lawrence Wood, upon which the said will was also duly proved. That the said Thomas Sutton intermarried with the said Sarah Wood, widow and devisee under the will

of the said Cullen—the defendant having entered upon the premises, by virtue of the devise in the will of the said Jonas deceased, as aforesaid. After the death of the said Cullen this suit is brought; and if the court shall be of opinion that the law is for the plaintiff, they find the defendant guilty of the trespass and ejectment set forth in the plaintiff's declaration, and assess 6d. damages and 6d. costs.—If not, they find the defendant not guilty.

Hall, J. The first question that arises in this case is, what estate was created in Cullen Wood by the following clause contained in Jonas Wood's will: "My will and desire is, that if either of my two sons, Cullen Wood and Lawrence Wood, should die without lawful issue begotten of their bodies, that, &c." It is a general dying without issue, which may happen 500 years hence, and not an event that must necessarily take place in any reasonable time. I therefore think, by this clause in the will, an estate tail was created in Cullen. Although the fact may have been that Cullen died without issue at the time of his death, that will not alter the case. The same construction must be now made upon the will, as would have been made upon it at the testator's death. 2 Bur., 878.

If the limitation to Jonas Wood is to be considered in the light of an executory devise, not being to take place till after an indefinite failure of issue, &c., it is too remote; and if it was too remote in its creation, no event will warrant a different construction afterwards in support of it. If, then, an estate tail was created in Cullen, the act of 1784 converted it into a fee simple, and Cullen had a right to devise it. But whether he exercised that right or not, is the next question. The clause in Cullen's will is very general and expressive: "Also all the remainder of my estate, whether within doors or out, that was not before given away. All the residue of my estate, and every part thereof, I give to my wife Sarah Wood, she paying all my just debts, funeral charges, &c., to her and her heirs forever." The word estate has a very general meaning; it includes both real and

personal estate. The direction that the devisee shall pay his debts, is also a circumstance deserving of notice. 3 Modern, 45. I think the land in dispute passed to Sarah Wood, by that clause in her husband's will, and that judgment should be entered for the plaintiffs.

JOHNSTON, J. The devise over in the will of Jonas Wood before the act of 1784, would have been held a contingent remainder, and not an executory devise; for though the contingency of one of the brothers, Cullen or Lawrence, dying without issue, might possibly take place in the lifetime of the other, yet such contingency was not necessary to vest the remainder in the defendant, for it might also take place many years after they were both dead, on a failure of issue in tail—the limitation over on the death of either of the brothers, is not confined to his dying without issue in the life of the survivor, but would take place on a failure of issue at any future period, however distant; and the death of Cullen in the life time of Lawrence, though there were no failure of his issue till after the death of Lawrence, yet Jonas would be entitled to the remainder, so that it is evident the interest of Jonas did not depend on Cullen's dying in the lifetime of Lawrence—the devise over to Lawrence, can therefore be considered no other than a remainder, contingent on the failure of the issue in tail, of course void under the laws of this country.

The devise in the will of Cullen, after giving several specific legacies to his wife of negroes, stock, &c., he adds in the same clause: "Also all the remainder of my estate, both within or out, that was not before given away." This gives his wife all the residue of his personal estate; and had he gone no further, there might have been some reason to conclude that he meant to give no more than personal estate. He then goes on as follows: "All the residue of my estate, and every part thereof, I give to my wife, Sarah Wood, she paying all my just debts, funeral charges, &c., to her and her heirs forever." This last appears to me a distinct devise, independent of anything that went before; and if it did not operate as a devise of his lands, it would be

altogether nugatory, his whole personal estate having been before disposed of in the most unequivocal terms.

It is observable, that where the testator gives the remainder of his personal estate, he uses no words of inheritance, whereas in the last devise he expressly gives to her and her heirs forever.

Wherefore it is my opinion, that under the will of Jonas Wood, Cullen took an estate in fee, and that the devise over to Jonas is void, the contingency upon which it was to take effect being too remote.

I am also clearly of opinion, that the plaintiff Sarah took an estate in fee in all the lands whereof her former husband Cullen Wood died seized; therefore that judgment should be entered for the plaintiffs.

Taylor, J. The testator, by separate clauses in his will, devises to his two sons, Cullen and Lawrence Wood, two several tracts of land, to them respectively in fee simple. In a third clause he desires, that if either of his two sons should die without lawful issue begotten of their bodies, that his son Joseph should have the land of the one so first dying; and in that event he devises the land of the one so first dying to his son Jonas in fee simple. In the succeeding clause he desires, that in case both his sons, Cullen and Lawrence, should die without lawful issue begotten of their bodies, James Wood should have the lands of the one so dying last in fee simple.

After the death of the testator, Cullen Wood entered upon the land devised to him, and died seized, leaving no issue; living his brother Lawrence Wood. The lessor of the plaintiff intermarried with the widow and devisee of Jonas.

The first question in this case is, whether the limitation in the will of Jonas Wood to his son Jonas, is effectual as an executory devise? The intention of the testator ought to be collected from the whole of the will taken together, and therefore though a fee simple is given to Cullen by one clause, yet it is qualified and narrowed down by such words as would, before the act of 1784, have made

it into an estate tail general. In consequence of that act, the estate devised to Cullen was a fee simple; and therefore the ulterior limitations to Jonas and James would have been clearly void, as common law conveyances. It is not necessary to shew that they cannot be supported as contingent remainders; for it is an axiom, that one fee cannot be in remainder after another. The limitation to James also is entirely unsupported by any of the principles which govern executory devises. It is limited to take effect after an indefinite failure of the brother who died last; and there is not in the will the slightest ground upon which a restriction can even be argued.

With respect to the devise over to Jonas, it seems to me that the arguments offered in support of it are founded on a misconstruction of the will, which supposes that the limitation to Jonas is upon a contingency which must happen, if ever, within a life in being, and that consequently there is no tendency to a perpetuity. If the words of the will would fairly warrant the construction, that the testator meant the limitation to Jonas to take effect only in the event of one brother dying without issue, in the lifetime of the other, nothing more would be necessary to support it as a good executory devise, according to the case of *Pells* v. *Brown*. Cro. Fac., 590. But the words "so first dying," must not be separated from the antecedent words, "without lawful issue begotten of their bodies;" for that were to make a supposition contrary to the express words of the will, that the testator did not mean to provide for the issue of his two sons; and would lead to this consequence, that Jonas should take the land of him who died first, though he might have left issue. But the intention clearly was, that Jonas should not take as long as there was any issue of the son who should die first. It follows, that if one of the sons had died leaving issue, which should afterwards fail in any indefinite period of time, living the issue of the other son, the limitation to Jonas would take effect, if the intention of the testator consisted with the rules of law. It is a limitation upon an unrestricted failure of issue, and would, if sanc-

tioned, produce all the mischief which the law is so solicitous to avoid; and the cases to be found in the books relative to perpetuities, apply a fortiori to the circumstances of this country, where restraints upon alienation are equally adverse to the spirit of the constitution and the form of government. It does not appear to me that this case is to be distinguished, in its material circumstances, from that of *Forth* v. *Chapman*, 1 P. William's, 667. There the testator gave the residue of his real and personal estate to his nephews W. & G., and if either of them should die and leave no issue of their respective bodies, then he gave the premises to D. It was decided that the construction as to the freehold, was, that if W. or G. died without issue generally, and of course that the limitation over to D. was too remote. And were this the case of personalty, there are no expressions or circumstances in the will that would afford a ground for construing the words "first dying without heirs of his body lawfully begotten," a dying in the lifetime of the survivor, notwithstanding the inclination of courts to support such devises over.

The next enquiry is, whether the words of Cullen Wood's will are sufficiently comprehensive to convey these lands to his widow? After sundry bequests of chattels, the residuary clause gives to his wife all the remainder of his estate, whether within doors or without, not before given away—all the residue of his estate, and every part thereof, she paying all his just debts, &c., to her and her heirs forever. The word estate comprehends everything a man owns, real and personal, and ought not to be limited in its construction, unless connected with some other word which must necessarily have that effect; or unless it is so used by the testator as to indicate his intent, that it should not be received in its ordinary acceptation. But here he adds the words, "and every part thereof;" and the devise is accompanied with a condition, that his wife shall pay his debts out of it. It is also expressed in such language as is applicable to the devise of real property; and the impression made upon the mind by the whole tenor of this will is,

that he did not mean to die intestate, as to any part of his property. The case of *Tanner* v. *Morse*, in cases temp. Talbot, and other cases therein referred to, seem to be decisive on this question.

MACAY, J. Agreed in omnibus, and

Judgment for the plaintiffs.

NOTE.—On the first point, see *Bryant* v. *Deberry*, 2 Hay. Rep., 356, and the cases and Acts of Assembly referred to in the note. See also *Brown* v. *Brown*, 3 Iredell's Rep., 134.

On the second point, see *Mably* v. *Stainbeck*, 1 Martin's Rep., 75, and the cases referred to in the note.

THE STATE v. JAMES CARTER.—Page 210.

In an indictment for murder where the letter "a" was omitted in the word "breast" in describing the place of the wound, judgment was for that cause arrested.

This was an indictment against the prisoner for the murder of William Loaper, upon the bill in the words and figures following, to-wit:

STATE OF NORTH CAROLINA, }
District of Fayetteville: }

SUPERIOR COURT OF LAW, April Term, 1801.

The Jurors for the State, upon their oaths, present, that James Carter, late of the county of Robeson, within the district aforesaid, labourer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the twenty-second day of November, in the year of our Lord, one thousand eight hundred, and in the XXVth year of the independence of the State, with force and arms, in the county aforesaid, in and upon one William Loaper, in the peace of God and the State, then and there being, feloniously, wilfully, and with malice aforethought, did make an assault; and that he the

said James Carter, with a certain knife of the value of sixpence, which he the said James Carter in his right hand then and there held, the said William Loaper, in and upon the left breast of him the said William Loaper, then and there feloniously, wilfully, and of his malice aforethought, did strike and thrust, thereby giving to the said William Loaper, then and there, with the knife aforesaid, in and upon the aforesaid left *brest* of him the said William Loaper, one mortal wound, of the breadth of one inch, and of the depth of four inches, of which said mortal wound the aforesaid William Loaper then and there instantly died; and so the jurors aforesaid, upon their oath aforesaid, do say that the said James Carter, the said William Loaper, in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, against the peace and dignity of the State.

EDWARD JONES, *Sol. General.*

Plea not guilty—The jury sworn to try the issue of traverse, found the prisoner guilty of the felony and murder, in manner and form a schaged in the bill of indictment.—And the counsel for the prisoner moved an arrest of judgment, for the following reasons:

1. Because, in the caption of the indictment, the term of the court is not sufficiently expressed, the year being written in numerical figures.

2. Because the place of the wound in that part of the indictment which charges with giving a mortal wound, and which states the length and breadth of the wound, is not sufficiently, or at all set forth.

WILLIAM DUFFY.

JOHNSTON, J. I am of opinion that the judgment should be arrested for the second reason, notwithstanding the meaning of the word *brest* is unequivocally explained by the antecedent words, where the wound is charged to be given under the left *breast*, and the mortal wound is charged to be given on "the aforesaid *left brest;*" yet I consider myself bound by all the authorities which require the greatest strict-

ness and accuracy in all capital proceedings, and which do not appear in any instance to have been dispensed with, though in some cases carried to a degree of critical exactness, not easily to be reconciled to good sense or sound understanding; and though this case may by some be considered of that description, yet I am not disposed to give a judgment which might appear in any respect to run counter to the opinion of the most learned and respectable judges, who have written or decided in like cases.

Taylor, J. I have no disposition to withhold my assent from the principle, that a criminal charge, and particularly one which may affect the life of a citizen, should be expressed fully, clearly and accurately. A due observance of this principle guards against the evils of discretional judicature; and whilst it affords additional security to civil freedom, and advances the claims of humanity, connects with the specific crime its legal and appropriate punishment. Wherever plain and intelligible authorities give countenance to an exception, either by application or just analogous reasoning—wherever the reason of the law speaks, though the law itself be silent, it is fit that objections so supported should be sustained by a court of justice. But, according to my apprehension, the doctrine has already been extended to a sufficient degree, to answer all the purposes of security and justice; and to extend it further, might justify those objections which have heretofore been alleged in reproach of the law.

The defect in the indictment for which this motion is made, is the omission of a single letter, a vowel which, if inserted, could not be founded in articulation, and the want of which could not possibly mislead the jury who found the bill, or anyone who reads it, as to the true meaning of the word. If, taken with the context, it were possible to affix any other meaning to the word, than that part of a man's body which is denominated the left breast, or if the word were wholly insensible, and conveyed no meaning, then the objection would strike me in a different light;

but connected as it is, with the adjuncts "aforesaid" and "left," the mind does not hesitate in applying its obvious signification. I do not think that much light can be thrown on this question by the cases that have been cited relative to indictments in Latin, the genius of which language is so essentially different from ours; for that it is by the varying termination of the substantive that the different connexions and relations of one thing to another are expressed: whereas prepositions are chiefly used in the English language for the same purpose. Hence the addition or omission of a single letter in a Latin word, is more likely to confound the sense, than in an English one. In the case cited from Cro. Eliz., 137, there is not only a false concord of case and gender; but the plural termination of the substantive "brachia," renders the sentence altogether uncertain; and the objection to the indictment arising from this circumstance, strikes deeper than the neglect of grammatical precision. We also learn from Long's case, which has been cited from 5 Co., that false Latin doth not vitiate an indictment, nor any false concord between the substantive and the adjective, because though the expressions be incongruous, yet they are Latin, and significant, and convey the sense as clearly as if they had been properly expressed. Otherwise it is if a word be used which is not Latin, or one that is proper Latin be used in another sense, whether different or more extensive. Another case is cited from Cro. Jac., 133, which appears to me not to bear upon the question. It is an indictment of perjury upon the stat. of Eliz. which ought to have been hereby recited: but in a material part of the indictment, the word "admitteret" is used instead of "amitteret," which the statute contains; and for this variance the outlawry was reversed—the two words belong to verbs which have distinct meanings; the one signifying to lose, the other to admit—such an error, which made nonsense of the sentence, could not but be fatal.

Then as to the case cited from Ld. Raym., 1515, where "austrialia" was used instead of "australia," that was decided to be insufficient on the ground of variance; upon

which subject, though the law is emphatically strict, yet it will appear that this decision is not reconcilable with its true doctrine. For this, as laid down in Cowper, 229, and Salk., 660, appears to be, that where the omission or addition of a letter does not change the word, so as to make it another word, the variance is not material; but that where the misrecited word is in itself not intelligible with the context, there the variance is fatal. Upon this principle it was, that "undertood" for "understood," in an indictment for perjury, was held not to be material; that "recieveed" for "received," in an indictment for forging a bill of exchange, was held not to vitiate the indictment, the court considering that it was only mis-spelt, and that there was not a possibility of mistaking it for any other word in the English language—Hart's case, Leach, 146. And upon the same principle also, it ought to follow, that the case in Ld. Laym. should have been differently decided, since the addition of a letter did not make it a distinct word.

Considering this case then, as well upon the authorities as upon the reason of the thing, I apprehend that it is not possible to mistake this word so mis-spelt for any other, and that the motion ought not to prevail.

HALL and MACAY, Judges, agreed in opinion with Judge JOHNSTON, and the

Judgment arrested.

NOTE.—*Quere?* whether such a defect would be fatal in an indictment since the act of 1811. (1 Rev. Stat., ch. 35, sec. 12.)

JOHN CARRINGTON v. JAMES CARSON.—Page 216.

One surety cannot sue another for contribution at law.

This was an action on the case brought by Carrington against Carson, to compel him to pay to the plaintiff the sum

of £86 10 11½, being one-half of a sum which the plaintiff, as joint security in a bond with the defendant, had paid by execution for Andrew Burke, the principal.

Plea, *Non Assumpsit.* The plaintiff had a verdict in the county court of Orange, from which the defendant appealed to Hillsborough superior court, and on the trial the plaintiff had a verdict for the above sum, subject to the opinion of the court on the following question, viz:—"Is an action maintainable by one voluntary security in a bond against another voluntary security in the same bond, the first having been compelled by execution to pay the whole money due by the principal debtor?" If such action cannot be maintained, then judgment to be entered for the defendant.

HALL, J. The plaintiff and defendant were both securities for Burke in a bond executed to the Trustees of the University—the plaintiff has been compelled to pay the amount of the bond by suit. The question is, can he compel the defendant to contribute the one-half which he has been compelled to pay. In this mode of action, 'tis true there is a moral obligation upon the defendant to pay to the plaintiff one-half of the sum the plaintiff was compelled to pay, in case the transaction has been a fair one. It is true, that this action on the case has been much extended, and made to embrace many cases of equitable and moral obligation; but I recollect no case where it has been held that this action would lie in a case like the present one: which is a strong argument to prove that no such action can be sustained—Lyttleton, sec. 108; Doug., 580; Ld. Raym., 944. Many instances of the sort have occurred, and many instances may be given, where bills in equity have been brought to obtain relief. When this money was paid by the plaintiff, to whose use was it paid? to the principal's use—there is no doubt but that an action would lie against the principal. If it was paid to his use, could it be paid to the use of the defendant also? If so, it was paid to the use both of the defendant and the principal; of course the plaintiff has an action against both of them jointly. Again, the

bond was executed jointly and severally—they all undertook to pay, and each one of them took upon himself to pay the whole. I am of opinion judgment should be entered for the defendant.

JOHNSTON, J. I am of opinion that the plaintiff cannot recover in this action, his only relief being in equity, unless in the case of an express promise. The other Judges agreeing in opinion, judgment for defendant.

NOTE.—See acc. *Robinson* v. *Kenon*, 2 Hay. Rep., 181. But now by the act of 1807 (1 Rev. Stat., ch. 113, sec. 2,) one surety may have an action at law against his co-surety.

FREDERICK W. MARSHALL v. JOHN LOVELASS, et al.—Page 217.

All persons interested should regularly be made parties to a bill, but where the enforcement of this rule would be attended with inconvenience, as where there are a great many persons interested in the same right, this rule may be dispensed with; but some of the persons interested must be named as complainants, and it will not be sufficient for the bill to be filed by a mere agent or attorney of the persons interested.

Lands held by one, who ceased to be citizen by the Revolution, in trust for the Unitas Fratrum, were not confiscated by the confiscation acts.

The court, before and instead of pronouncing a judgment on a demurer to a bill, may give leave to the party complaining to amend his bill and to state that matter, without which the demurrer would be allowed.

This was a case in Equity from Morgan Court, in which the complainant, *for himself and the concerns of the Unitas Fratrum in this State*, states that the said Unitas Fratrum had been acknowledged as an ancient Protestant Episcopal Church by the Parliament of Great Britain, and the Bishops of the Church of England, by a public act of Parliament of the year 1749, before the revolution; and as such has subsisted in this State above forty years; and the title and style of the said public act of parliament, have been acknowledged and ratified by acts of the Gen-

eral Assembly of this State. That the said church has no joint stock, or funds, nor revenues, yet at sundry times the active members have made loans among their friends and able members, for general concerns; in particular for new settlements, as has been done in the case of the *Wachovia* district in this State, and the expenses of that colony for the first years; for which purpose great capitals were raised, upon condition that creditors who might come over to America should receive payment in land; but if they remained, to be paid by the sale thereof to be made by him who had the fee. That the complainant came over to America to manage the affairs of the Unitas Fratrum—that the lands purchased were conveyed to him; and that by an act of the General Assembly, passed at Hillsborough in 1782, the deeds made to him were confirmed, and he was thereby authorized to transact the business of the Unitas Fratrum.

That the complainant, by the appointment of the said Unitas Fratrum, hath been duly authorized by them to institute suits either in law or equity, in relation to the matters to be complained of—that they are bound and concluded by all such judgments and decrees as shall be given by the courts of this State, upon any suits which he may institute in relation to the same.

That Henry Cossart, who was agent for the Unitas Fratrum, known and admitted as such by the act of parliament before spoken of, representing to the late Earl Granville that the Wachovia district, sold and paid for as good land, had been found to contain much poor land, had, on the 12th November, 1754, obtained, by way of retribution, two deeds of grant in the name of Henry Cossart, agent for the Unitas Fratrum, upon a plot returned into the land office by the surveyor of Wilkes county, wherein mention is expressly made, that the said lands were surveyed for the Lord Advocate, Chancellor and Agent of the Unitas Fratrum, all of whom were officers, agents and trustees of the same; which lands are described by buts and boundaries; the first tract containing 3,840 acres; the second containing 4,933 acres.

That the lands were conveyed and granted to the said Cossart in trust for the Unitas Fratrum, and no otherwise.

That Henry Cossart died before the Declaration of Independence, in the year 1776, leaving Christian F. Cossart, of Antrim, in Ireland, his heir-at-law, upon whom the lands descended, and who was seized thereof before the Declaration of Independence—that the said Christian F. Cossart, at the time of the said descent, was a subject of the King of Great Britain, residing in Ireland, and from that time hath continued, and still is a subject of the said King, and since the time of the descent hath never come over to this State. That by the Declaration of Independence, the said C. F. Cossart became an alien to this State, by which, or by virtue of the confiscation laws passed in 1777, and at divers times afterwards, the lands held in trust, as to the *legal title*, are supposed to have become vested in the State. That the complainant is advised that the lands having vested in the State, by a voluntary acquisition, *in default of any legal proprietor*, that the equitable interest which the Unitas Fratrum before had, was in no wise injured, impaired or diminished; and that every person obtaining any grant or conveyance of the legal estate of said lands from the State either with an intent to defeat the trust estate of the said Unitas Fratrum, or with notice of the Unitas Fratrum, or their trustees, equitable interest thereon, became seized of the said legal estate only *in trust* for the Unitas Fratrum.

That C. F. Cossart, after the descent of the said lands to him, on the 3d day of November, 1772, that the lands might be sold for the use and benefit of the Unitas Fratrum, executed a power of attorney to the complainant to sell and dispose of the lands in his name, and to appoint attornies under him to carry the objects of the power into execution: The complainant was called to Europe before he sold, but previous to his departure, on the 4th day of Oct., 1774, he executed a power of attorney to the Rev. John Michael Graff, now deceased, being one of the members of the Unitas Fratrum, authorising and empowering him to sell the lands descended from Henry Cossart to the said C. F. Cossart. That the said John Michael Graff, on

the 22d July, 1778, articled to sell and convey to Hugh Montgomery, of Salisbury, the two tracts of land, for the sum of £2,500, procl. money, 8s. per dollar, to be paid in specie, and received of Montgomery £1,000 in part. That on the 23d July, 1778, by a deed duly executed to pass lands, John Michael Graff conveyed the land to Montgomery, and for securing the payment of the residue of the purchase money, Montgomery demised the lands to Graff for a term of 500 years, with a proviso to become void if the money was paid. Shortly afterwards Graff died, and Tranggott Bagge, of Salem, administered upon his estate, and knowing that the term of 500 years was vested in Graff in trust for the Unitas Fratrum, he, on the 30th December, 1784, assigned it to the complainant, agent and trustee for the Unitas Fratrum.

That in all those transactions, John Michael Graff considered himself, and was considered by Hugh Montgomery and the Unitas Fratrum, to have been acting as the agent and trustee of the Unitas Fratrum, and that the name of Cossart was used only because the legal estate of the land was supposed to reside in him. That Hugh Montgomery conveyed the land to trustees for the benefit of two infant daughters, and by his last will and testament charged his whole estate, both real and personal, with the debt due to the Moravians, which he directed to be paid in gold or silver.

That John Lovelass and others, pretending to derive title under William Lenoir, who obtained a grant under the authority of the land laws passed in 1777, are in possession of the lands. The bill then prays, that if the *legal* estate be vested in the defendants, that they be decreed to convey to the trustees of Hugh Montgomery, for the benefit of his daughters, and that the executors of Hugh Montgomery be decreed to pay the balance of the purchase money, and the interest due thereon.

To this bill the defendants demurred, and for causes of demurrer shew, that by the bill it is stated :—

1. That Frederick William Marshall sues for himself and the concerns of an Episcopal Church, (called by him the

Unitas Fratrum) in this State: But the bill does not shew what persons these are, who, beside the said F. W. Marshall, have brought the suit, nor what interest they have respectively therein, nor indeed that they have any interest at all, in law or equity, to the lands sued for in and by said bill.

2. The said F. W. Marshall sets forth, that by the appointment of the Unitas Fratrum he had been duly authorized to institute suits at law or equity in relation to the matters in the bill, and they are bound by the acts of the said F. W. Marshall, to be obedient to any judgment or decree, rendered on all suits brought by him on their behalf; and he further sheweth in his bill, that the lands now sued for were procured by Henry Cossart, out of funds raised by active members of the society, on loan, by their friends and able members of the society, for general concerns; and that as to the lands purchased in this State, the creditors were to receive payment in land, if they came over to this country, or out of the sales thereof by him who had the fee: whereby it appears, that if the lands held by Henry Cossart were held in trust, it must have been to convey to creditors who lent their money, and came to this State, or in trust to sell and raise money for such of them as did not come to this State, and are now aliens—or the estate must have been held in trust for a corporation of aliens, named the Unitas Fratrum. Yet who those creditors were does not appear, neither their names, places of abode, nor the sums lent by them respectively. Whether those creditors were the original lenders of the money, or whether they claim as representatives of such original lenders, does not appear; neither does it *appear that the suit has been brought by them, or by any power from them, or any of them:*—And as to the society called the Unitas Fratrum, it is not stated that such society ever was incorporated; nor doth the said F. W. Marshall shew by what legal means he has been authorised to sue, or in anywise act as agent of the Unitas Fratrum, who do not appear ever to have been legally incorporated, and who, as he saith, have no joint stock, funds or revenue.

3. It appears by the bill, that Henry Cossart, to whom the land in question was granted, was an inhabitant of Ireland, and it is not stated that he ever entered on this land, or that any person ever did enter thereon under any power from him. It also appears that the said Henry Cossart died, leaving Ch. F. Cossart, his son, a native of Ireland, and resident there, his heir-at-law; but it does not appear that the said Ch. F. Cossart ever did enter on the same lands, claiming the same as heir, or that any other person acting by a power from him, ever did enter thereon in his name and to his use, so as to vest the said lands and estate of the said Henry Cossart in said Christian, as heir, &c.

4. It appears by the bill, that Ch. F. Cossart, at the time of the Declaration of Independence, was an inhabitant of Ireland aforesaid, part of the dominions of the King of Great Britain, and it is not stated that he ever afterwards came to this State, or any of the United States, and became a citizen, so as to enable him to hold real estate in this country: And that the sale of the land by John Michael Graff, as agent or attorney of said Ch. F. Cossart, to Hugh Montgomery, was made in the year 1778, when said Ch. F. Cossart was *an alien enemy.*

5. It appears that the Unitas Fratrum is a religious society, and was so at the time of the purchase of Henry Cossart, and the grant made to him of the lands now sued for; yet it is not stated that licence from the King of Great Britain was obtained, to enable him to make such purchase in trust for the Unitas Fratrum.

Wherefore, and divers other good causes, the defendants do demur, &c.

Duffy, for the defendants, and in support of the demurrer. The first and second causes of demurrer go to the form of the bill, which is certainly defective for want of parties—all persons concerned in lands, however numerous, must be named. Harrison's C. P., 91. No attorney can bring a suit in his own name. Mitford, 144; 2 Vesey, 312. A *few* creditors may sue for many, but the names of *all* must be inserted. Finche's Ch., 592. The cases which have

been decided regarding the South Sea bubble, are not to be regarded as precedents; and if F. W. Marshall sues for the society, he ought to name them all. Where the inheritance is concerned, all the parties ought to be before the court.—Bunberry, 181. Wherever there is a *ces luy que trust*, he must be a party. Finch's Prec., 275; Gilb. C., 252; 2 Eq. Ca., 165.

This bill would be no bar to a suit brought by the Unitas Fratrum, when they were properly named. 1 Bla. Com., 467. If they are not a corporation, then they must be severally named. If there be no joint stock or revenue, how can Marshall be appointed to sue for them? It is said that he does so by virtue of an act passed in 1782, (see in Martin's collection of private acts, the act to vest in F. W. Marshall all the lands, &c.)—there is no power given to him by this act to sue for the Unitas Fratrum.

No persons should be harrassed by a suit which does not finally settle the question; and if a decision be made for the defendants they are unsafe, because they may be disturbed by another suit.

A. Henderson, on same side. The complainant, F. W. Marshall, states, that he sues *for himself and the concerns of the Unitas Fratrum.* Upon the face of the deed to Cossart there is no trust—one of the stipulations mentioned in the bill is, that he who lent money should take land from him who had the fee, if he came to this country; if not, to have the money repaid from the sales of the land. The lenders of the money ought to have been made parties, as they certainly have an interest in the property in question.—Marshall does not appear from the bill to have any interest in the land—only those who loaned the money are stated to have an interest therein: And although the rule that a *few* may sue for *many* be true, yet where one alone sues, it ought to be stated that he has an interest in the thing in question.

If the complainant sues by appointment, it will be proper to enquire by whom he is appointed—and it does not appear that it was either by those who lent the money,

or the society at large. The question here is independent of the first deed, but arises on the second, which was made by way of retribution. The bill states that it was made for the Unitas Fratrum—upon the face of it, it was made for Cossart. The parties to the bill, and those for whom the deed was made, are at variance. It would be highly unjust to decree the lands to the complainant for the Unitas Fratrum generally, as those who lent the money are alone entitled to have them. On the 3d cause of demurrer I shall make no remark.

The 4th cause of demurrer states, that Christian Frederick Cossart was an *alien*—that he never came to this State: And the conveyance from Graff to Montgomery, being in 1778, shews that the complainant, and those for whom he sues, have no right either in law or equity. It is of importance here to enquire, who had the right to the lands on the *fourth day of July*, 1776—on that day I contend they escheated, and if they did not escheat, that they were afterwards confiscated.

Whenever there ceases to be a person who can legally take and hold the land, it escheats. 1 Black. Re., 133. The case of *Bayard* v. *Singleton*, in Newbern Superior Court, was determined on the ground, that at the time that Cornelle executed the deed to his daughter, under whom the plaintiff claimed, he was *an alien*, and not entitled to past lands—consequently that the lands had escheated, and escheats are recognized by the laws of this State.—See the acts of 1715.

If the land has escheated, it then becomes necessary to enquire in what manner has the State taken? I contend that the land is taken by the State, exempt of any trust—for in England, when the Lord or King takes by escheat, they take discharged of the trust. 1 Coke's Rep., 122, Chudleigh's case. Before the statute of 27 Henry 8, whenever feoffee to uses did anything which produced escheat, the land reverted to the Lord discharged of the trust. Uses and trusts are substantially the same. 1 Bl. Rep., 180, 182; 1 Alk., 391; Hardress, 491. The same doctrine

which governed uses now governs trusts—all the cases which will be read on the other side, are mere *obiter dictums.*

The case of Eales and England, Eq. Ca. ab. and Finch's Prec., in Ch., 200, have no application to the present case.

I shall now speak of the operation of the acts of confiscation on this case. The acts of the General Assembly, to be found in Iredell's Rev., pages 341 and 364, shew what lands the State intended to seize, and to what uses the State seized them. The land in contest is completely within the operation of these acts. Cossart did not embrace the opportunity of becoming a citizen, and thereby holding the land, as he might have done—he chose to remain abroad, and the loss is a consequence resulting from his own conduct. Confiscation of property belonging to people of a certain description, was an high act of sovereignty, executed by the representatives of the freemen of this State in a moment of severe pressure; and however hard the operation of this law may be on Marshall and his associates, yet, as it is the omnipotent fiat of a sovereign and independent people, the court cannot say that the State took the lands for any other uses than expressed in the laws by which the property is acquired.

Williams, (Ch.,) for the complainant.

A demurrer admits the truth of the facts stated in the bill. If this he a true rule, then, it sufficiently appears that the Unitas Fratrum have an interest in the land. There are many exceptions to the general rule, that all parties ought to be joined. If it was adhered to, it would frequently prevent the administration of justice. The Unitas Fratum constitute a voluntary society, and not a corporation, and the lands acquired by them are vested in one for the use of the whole; and the suit being brought by Marshall for them, they are substantially parties. The case from Prec. in Chancery, 592, was the case of a voluntary society, and shews that a *few* may sue for the *whole*, and it is not necessary to make all parties *by name*, where they claim one *general trust.*

As to the second cause of demurrer, is it to be supposed that those who lent money to purchase the Wachovia settlement are still unpaid, and that they still have a lien upon the land? Certainly not. If the lenders of the money came to America, they were to be paid in land—if they remained in Europe, they were to be paid the money advanced, with the interest. It cannot be supposed that those creditors had any lien upon the land; if they had, they must have joined in the conveyance of it. The complainant states that he is authorized to bring suits in law and equity for the Unitas Fratrum, and the demurrer admits the truth of the allegation; and it can only be denied by plea or answer. If it be not necessary to state the *names* of each individual, then also it is unnecessary to state their *respective interests.*

As to the 4th cause of demurrer, Mr. Henderson has contended that the land escheated and became discharged of the trust—this is denied on the part of the complainants.

At the time of the Declaration of American Independence, this was a part of the mother country; and before that event, any of the subjects of the king of Great Britain were entitled to purchase and to hold lands in this or any of the United States. When independence was declared, Cossart became an alien to this State, but I contend that his alienage worked no forfeiture of his estate. When the war broke out those who did not like the new government were at liberty to sell their lands, and retire with the proceeds where they pleased; and this is agreeable to the law of nations. Vattel, B. 1, sec. 33, 195. This doctrine seems to have been held in view by the framers of the constitution. Iredell's Rev., 276. Declaration of Rights, sec. 25. This section only changes the sovereign, and by it no escheat can take place, and aliens may still take and hold lands. This section provides that the titles made by the king and the lords proprietors, shall not be affected; and the General Assembly of this State have shewn that they were under the influence of this opinion, as appears from the 3d Chap., Acts 1777. Iredell's Rev., 284, 285, by which in substance it is

enacted, that those who leave the country may sell their property, and export the proceeds in any kind of produce, naval stores excepted; but if any real estate remained unsold three months after the departure of such person, that it should be forfeited to the use of the State. It was clearly considered, that by the Declaration of Independence no forfeiture of lands was produced. In November, 1777, Iredell's Rev., 322, they again had liberty to sell. In page 341, we find the confiscation act: By this it was considered that on the 4th day of July, 1776, persons therein described held lands in the State, and continued to hold them without escheat, till they were confiscated; and it was thereby enacted, that unless the absentees appeared by the time therein limited, to become citizens, their lands should be confiscated. These acts are the expositors of the Declaration of Rights and of the Constitution, and ought to be regarded. According to Lord Coke, expositions made of an instrument at or about the time of its passing or creation, are the best and strongest expositions.

There is another act in Iredell's Rev., 364, which refers back to the 4th day of July, 1776, and prevents any improper conveyance in the meantime; and declares the lands of all persons of the description of those mentioned in the acts of 1777, to be absolutely forfeited.

At the termination of the war, a treaty was made between the king of Great Britain and the United States of America, which proves that the lands were not considered as escheated. Art. 6, (the words are) "There shall be no future confiscations." If the lands had escheated by the change of government, there would be nothing left for this article to operate on.

By the private act passed in 1782, we have a legislative declaration, that the lands of the Moravians, and this tract particularly, are not considered as confiscated. Cossart is not named in any of the confiscation acts, and although of that general description of persons whose lands were intended to be confiscated, yet he has never been proceeded against in such manner as to divest him of his right; and

until he hath been found by inquest to be of the description of persons named in the act, his lands are not confiscated.

Although we should not be able to shew any cases to prove that the king or lord took the escheat subject to the trust, yet, as this is a Court of Equity, the relief asked for by the complainants ought to be extended to them. If the feoffee and his heirs are bound to perform the trust, why is not the lord or the State bound also to execute it? —the lord cannot shew that he is entitled to the escheat, till he shews that he made a grant, and that his tenant died, or committed some crime for which he is attainted: Why then should the lord say, because the feoffee is dead, the *ces luy que trust* shall be deprived of the estate?

In the case of *Eales* v. *England*, Finch's Prec., ch. 200, the trustee died without heir, and the lord took the estate subject to the trust. This is a case of modern decision, and over-rules the opinion that the king or the lord takes discharged of the trust. It is laid down in 1 Eq. Ca. Ab., 384, that no act of the trustee shall prejudice the *ces luy que trust:* Hence it follows, that the rights of the *ces luy que trust* remain unimpaired, whether the trustee continues to execute the trust himself, or whether by his death or attainder, the estate devolving upon the lord carries with it and fastens upon him the duty of executing the trust.

Mr. Williams, further to shew that if the State took the lands it was subject to the trust, cited 2 Plow., 488. Pet. of Right—2 Bla. Com., 329, 330; 5 Bac. Abr., 360, pl. 50. 393, pl. 1; 1 Harr., 29; 1 Eq. Ca. Ab., 384. [D] pl. 1 in Margine; 1 Bla. Re., *Burges* v. *Wheate*. He made no remarks on the 3d or 5th cause of demurrer.

Haywood, on the same side. It must be admitted that when the lands were purchased by Cossart and the deed made to him it was for the use of the Moravians—they had the real and substantial right in the land, and although they have never parted with it, yet by the operation of some of the acts of the General Assembly, their interest is to be transferred, and they are to be deprived of it; but fortu-nately for the complainants, the law is not calculated to do such manifest injustice.

It has been contended that Cossart became an alien to this State—that the land escheated, and that the State has taken it discharged of the trust. I will first consider what is an escheat—it does not arise in consequence of alienage—it happens where the tenant dies without heirs, or attainted of a crime which corrupts his blood, and destroys the inheritance—2 Bla. Com., 241; 1 Bl. Re., 132, 133, 143, 164, 174, 175, 184, 185. It is a confusion of terms to say that lands escheat for *alienage*, and by *forfeiture;* because in the one case the land goes to the lord, in the other to the king.

Escheat is a consequence of *feodal tenure*—no such tenure existed in this country at the Declaration of Independence. When the lands of this country became *allodial*, feodal tenures ceased, and with them escheats also. If it be considered that the State took the land by forfeiture, and not by escheat, then the authorities cited to shew that where, in cases of escheat, the lord takes discharged of the trust, fail of application in the present case.

Where an alien purchases lands, he may hold till an office found; and the reason why in England it is necessary is, that the people being jealous of the power of the king, procured it to be declared by Magna Charta, that the king should not take till an office found—Hardress, 495; 2 Vesey, 541; Co. Litt., 2 [6]; Dyer, 283; 5 Repts., 52; 3 B. C., 259; 3 Mo., 101; 5 Re., 110; 3 Inst., 254; 2 Inst., 169; 2 B. C., 294. The State of North Carolina had no right to take the land till an office found that Cossart was an alien, and now the time to shew that fact is past. Moreover the Legislature in 1782, clearly expressed their determination that they would take no advantage of Cossart's alienage.

Suppose, then, that the land came to the State by confiscation, yet it must take it with the trust attached to it, and the alienees of the State must take it subject to the trust, because they had no notice of the claim of the Unitas Fratrum—they cannot shew that the trust was separated from the land when it came to the State. Cossart's title

was merely nominal—a trustee for the Moravians; and the State taking his right stands in his place, and is their trustee; and it was certainly so understood when the General Assembly, by the Act of 1782, declared that the confiscation should not extend to the lands of the Unitas Fratrum.

All the cases cited to prove that the king takes discharged of the trust, are mere *dictums*, laid down out of complaisance to the king; but the more modern decisions shew that the king can be a trustee. 1 Vesey, 453; Saunders on Uses and Trusts, 192. And although the king cannot be sued, yet his alienee may be, for he does not partake of his privileges or immunities.

Suppose that neither the State or alienees are suable, yet the trust attaches upon the estate in the hands of the tenants, and the court will appoint some person to execute the trust. Saunders, 116, establishes the rule, that the disability of the trustee shall not prejudice the trust, and the Court of Chancery will proceed as if there was a trustee.

As to the objection for want of parties, the demurrer is a silent thing—you cannot take more into view than is disclosed by the bill; no persons are mentioned in it but the Unitas Fratrum *of this State;* and no history of Moravian settlements which shews that there are others of the society in Europe, ought to be regarded, or allowed to affect this case. I would ask could the lenders of this money come into court, and demand a conveyance of *all the land?* Certainly not. Theirs is only a personal contract, and if their money was not paid to them, they might recover it, unless they chose to take the land according to stipulation. A judgment in this case will be conclusive, and will bar any others of the Moravians from bringing suit respecting the property in question. Marshall is their attorney—his acts bind them as well when they are *generally described*, as when particularly named.

Duffy, in reply.—It is insisted by the complainant's counsel, that the title of Christian F. Cossart is saved by the bill of rights: the true rule is, that you must construe the section according to the subject matter of the context—the

individuals mentioned must mean the citizens of North Carolina, and not aliens. If the construction was otherwise, then almost all the lands of this State would be monopolized by aliens, and the claim of Lord Granville and his heirs would thereby be revived. The acts of confiscation, so far from supporting the construction contended for, shew that at the time they were passed, the Legislature considered that from the 4th day of July, 1776, those persons had lost their rights; because it is declared, that they "may return and be restored to the possessions which to them *once* belonged." And although acts of confiscation were passed, yet they seem to be more out of abundant caution, than intended to operate on what had before that time escheated.

It has been argued that Cossart's title has never been extinguished, because no office has been found; I contend that has been done which is equal to an office found, viz.: By the Declaration of American Independence, and its subsequent confirmation, the land escheated; and the passing of the act of 1778 is an express taking away of his right.

The only case where the king takes subject to a trust, is where there is a forfeiture, and not where there is an *escheat:* In the one case he takes under the tenant; in the other he takes by title paramount, for the want of heritable blood. It is certainly the opinion of the complainants, that the lands in question have either escheated, or have been confiscated; otherwise C. F. Cossart might bring an action of ejectment against the tenants, and recover the possession.

Henderson in reply. Does Marshall, the complainant, show that *he* is of the Unitas Fratrum—that *he* is interested in the matter in dispute? He certainly does not. It doth not appear that he hath anything more than a mere appointment, which cannot give him any right to sue in his own name. The bill is defective, inasmuch as it doth not shew that the lenders of the money over came to this country and received lands, or that their money has been repaid.

I am inclined to think that the position which maintains that an alien loses his land by forfeiture in England is

correct; and the true reason seems to be, that it is a punishment on him for his presumption in purchasing lands which he cannot hold. But it is otherwise, where the lands escheat for the want of heritable blood, and then they go to the lord.

If land be purchased by one who dies without issue, it escheats; why not escheat where he dies leaving a person incapacitated by law to take? Whenever land is taken by *forfeiture*, it vests immediately on the purchase; but it does not *escheat* till the heritable blood fails. Mr. Haywood admits, that the State took in 1776 by forfeiture, but he alleges it took subject to the trust; but the State has expressly declared that she exonerated herself from the trust, and would not execute it; and this conclusion results from the act of 1779. The fact of Cossart's absence from the United States is admitted by the bill, and that he never returned is also admitted. It then follows, that there can be no necessity of having an office found to establish a charge, the truth of which is admitted.

The inference drawn from the last section of the private act passed in 1782, is, in my opinion, directly against the complainant—it shews that the General Assembly considered the title of the State to the land in Wilkes as good, and that they intended nothing more than to authorise the registration of the power therein mentioned: If anything more than this was intended, they would certainly have used the same operative words, as are used in the sections which confirm the lands conveyed by Hutton and Medcalfe.

If all the authorities cited yesterday are to be overruled by precedents in chancery, then it is useless to shew what the law has been for 3 or 400 years. The hardship of the case is entirely out of the question, and arguments which are built upon it ought to be disregarded. The court cannot supply the place of a trustee when the land escheats, as they may do in the case of corporations. If the trust is dead, 'tis useless to supply a trustee—it would be better to shew how the trust can be revived, than to devise a way to

supply a trusteee. It is useless to shew that the alienees of the State can be sued, without shewing that they took the trust along with the legal estate; for as the trust was extinguished before the alienees took, the land passed discharged of the trust; for the State cannot hold in trust for aliens. Gilbert on Uses, 43; 1 Co. Re., 122; Har., 495.

Hall, J. The bill is brought by F. W. Marshall, who sues for and in behalf of himself and the concerns of the Unitas Fratrum in this State. To this bill there is a demurrer, in which one cause of demurrer set forth is, that the bill does not shew what persons those are that (besides the said F. W. Marshall) have brought this suit.

At the same time that the demurrer was argued, a motion was made by the complainant's counsel for leave to amend the bill, in case it should be thought by the court that the cause of demurrer before stated was a good one. I will first consider whether it will be proper to grant leave to amend the bill. Wherever the court has power to permit an amendment to be made, it is better to exercise it than to suffer a suit to go off, upon an objection to form, or indeed any objection in which the merits of the cause are not involved. A plaintiff may amend his bill upon payment of costs of the demurrer. Wyatt's Register in Ch., 68. After argument of a demurrer to the whole bill, and the demurrer held good, it is not usual to allow an amendment, because the bill is regularly out of court. But, from this rule of practice, it seems there are some exceptions—one is, in case of a demurrer for want of parties; in this case an amendment has been permitted to be made, although upon argument the demurrer has been held good. 2 Ch. Ca., 197; 2 P. W., 300; Wyatt's Register in Ch., 164.

This case has been set for hearing upon bill and demurrer—it has been argued; but as yet the court have given no opinion. I feel myself authorized, at this stage of the proceedings, to allow the bill to be amended, upon the complainant's paying the costs of the bill, and one fee for counsel. The leave given to amend the bill, arises from a conviction that this part of the demurrer would prove

fatal to the bill, in case it was to rest on that issue alone. Although it may not be necessary to give the reasons on which that conviction is founded, I will do it in a concise manner, as all the court have not the same impressions with respect to the demurrer. Here two questions arise: 1st. was it necessary that the names of all or any of the individuals composing the U. F. should have been mentioned by name in the bill? It is regularly true, that all persons interested should be made parties by name; because although a decree may be made if that is not the case, yet none but parties, and those claiming under them are bound by it. 1 Harrison's Cha., 32, 6 Ed. This is a good general rule and like most others stands proved by its exceptions. Those exceptions are founded on necessity, and the impracticability of obtaining justice in many cases by a strict adherence to that rule, where there are a great many persons all interested in the same way. If it was indispensably necessary to make them all parties by name, there would, in all probability, be so many abatements by death &c., that it would be extremely difficult ever to come to a final determination. 2 Eq. Ca. Ab., 167. It is said by Lord Ch. Hardwicke, in the *Mayor of York* v. *Pilkington* and others, 1 Atk., 282, "that a bill may be brought against tenants by a lord of a manor for encroachment, &c., or by tenants against a lord of a manor as a disturber, to be quieted, &c. As in these cases there is one general right to be established against all, it is a proper bill—nor is it necessary all the commoners should be parties. So likewise a bill may be brought by a parson for tithes against the parishioners, or by parishioners to establish a *modus*, for there is a general right and privity between them, and consequently it is right to institute a suit of this kind."

The case in 2 Browne's Rep., 338, was a case where it was thought practicable that all the parties, to-wit, the part owners of the ship, might be named in the bill; and whenever that is the case, it is proper to name them: But whenever it is not practicable, with a view to settle the rights in question, it is unnecessary to make all the individuals par-

ties by name—and with this principle I think common reason, and the authorities I have seen on the subject, accord. I therefore think that in the case now before us, where the individuals composing the U. F. are so numerous, that, to require that each individual should be named as a complainant, would so much embarrass the future progress of the suit, and subject it to so many unavoidable delays, as to amount nearly to a denial of justice; and of course that such a requisition ought not to be made. Although for the reasons before stated, I do not think in some cases that *all* persons should be made parties by name, yet I think *some* of them ought; and that in the present case some of the individuals composing the U. F. should have been mentioned as complainants. The inconvenience of making all of them parties by name, does not hold good against the requisition that some of them should be made parties by name; and in proportion as the reason fails, on which the exception as before stated is founded, so in proportion ought the rule that all persons interested should be made parties by name be adhered to. A bill may be brought by a few creditors on behalf of themselves and the rest: the names of all of them need not be mentioned, but the names of some of them must. If the names of some of them are not mentioned, it is certainly a good cause of demurrer; and there can be no aid decreed from the circumstance that the name of their agent is mentioned in the bill who sues on their behalf. A bill cannot be brought by an agent in his own name, it must be brought in the name of his principal. 2 Vesey, 313. I therefore think that the names of some of the individuals composing the U. F. ought to have been expressed.

2d. What interest does it appear from the bill F. W. Marshall has in the property in dispute? Or, in other words, is it to be collected from the bill that he is one of the U. F.? The bill expresses that the suit is brought by F. W. Marshall, on behalf of *himself and the concerns* of the U. F. in *this* State. From this expression it appears, that whatever his interest may be, it is distinct from that

of the U. F. If he was one of the U. F. and sues in that character, it certainly is not so expressed—it is stated not only that he sues on behalf of the interest of the U. F., which interest, to-wit, the interest of the U. F. comprehends his own, if he sues as one of them; but further expresses, that he sues on behalf of himself. Now if he sues on behalf of himself, as one of the U. F., the expression means nothing more than is to be collected from the one immediately preceding it, where he says he sues on behalf of the interest of the U. F. Suppose it was asked and ascertained what his interest was, would that satisfy a desire to know what the interest of the U. F. was? Or suppose it to be known what the interest of the U. F. was, could that be relied upon as a certain knowledge of what the interest of F. W. Marshall was?

It appears from other parts of the bill, that C. F. Cossart, after the descent of the lands in question to him executed a power of attorney in the year 1772, to F. W. Marshall, empowering him to sell, &c., said lands, and also authorizing him to constitute other attornies. That in 1774, F. W. Marshall executed a power of attorney to John Michael Graff, who sold such lands to Hugh Montgomery. That Hugh Montgomery, by deed, &c., demised the said premises to the said John M. Graff, for and during the term of 500 years, with a proviso, &c., that the same should be void upon the payment of the purchase money. That the said John M. Graff afterwards died. That Trauggott Bagge became his administrator. That he assigned the said term to F. W. Marshall, then and now the agent and trustee of the said U. F. It is again expressed, that by the appointment of the said U. F. the said F. W. Marshall hath been duly authorized to bring suits—that the U. F. are bound by all judgments rendered in such suits. Thus it appears what interest F. W. Marshall really has. In the first place, he is agent for selling the lands; in the next, for instituting suits. If he brings this bill as agent, &c., for the U. F. but not in their names, or the names of any of them, we have already seen that the suit is not well brought. It did not follow, that because he was an agent for the U. F. that he was one

of them, because that agency might as legally have been intrusted to a person that was not, as to a person that was of the U. F. If he sues as assignee of the term of 500 years, that is an interest distinct from that claimed by the U. F. In another part of the bill it is stated that he has the fee; if so, the U. F. has it not, so that that is an interest distinct from theirs. He may act as agent, &c., be possessed of the term, &c., or have the fee, &c., and still not be one of the U. F. If he is one of them, those interests are distinct from that claimed by them. I conclude that it does not appear from the bill that F. W. Marshall was one of the U. F. and that had leave not been given to amend the bill, this part of the demurrer must have proved fatal to it. The first cause of demurrer goes on to state that the bill does not set forth what interest they (the individuals composing the U. F.) respectively have; nor indeed that they have any interest at all, in law or equity, to the lands sued for. The bill expressly states that the lands in question were conveyed and granted to Henry Cossart in trust, &c., and thereforward held the said land as trustee for the said U. F. and no otherwise. The facts stated in the bill must, at this stage of the proceedings, be received and taken as true: if so, what interest the U. F. has, clearly appears from the bill.

With respect to the second cause of demurrer, this is not a dispute between the lenders of the money and the complainants. How could the complainants comply on their part, viewing the interest of the lenders of the money in the light in which the demurrer places it, unless they had the fee, either to make payment with, if the lenders of the money came over, or to sell by him who had the fee. The bill does not state that the land was held in trust for the lenders of the money—a recovery in the present instance cannot prejudice any right which the lenders of the money may have. The U. F., whether incorporated or not, appear to have been recognized by the Legislature of this State in the year 1782, as having an existence, and capable of having lands held in trust for them. Martin's collection of private acts, 105. The preamble of this act

states, that "Whereas F. W. Marshall hath made it appear to this General Assembly, that all the tracts of land within this State belonging to the lord advocate, the chancellor, and the agent of the U. F. or United Brethren, have been transferred to him from the former possessors in trust for the U. F." And the act then goes on, and after declaring some deeds to be valid, and directing them to be admitted to probate, vests certain lands in F. W. Marshall in trust, as aforesaid.

As to the 3d and 4th causes of demurrer, it appears from the bill that the lands in dispute were conveyed to Henry Cossart, as agent, &c., in the year 1754, and that no adverse claim has been set up, until that on which the defendants now rely, or that from which they attempt to derive title. That C. F. Cossart, to whom the lands descended, was, at the time of the Declaration of Independence, and ever afterwards, a subject of the King of Great Britain. I suppose it cannot be contended, but that these lands were legally held by the Cossarts until the Declaration of American Independence. Immediately after this declaration, the State of North Carolina, like the other States in the Union, became a sovereign and independent State, and chose for herself her present form of government. In the 25th section of the Bill of Rights it expressed, "that the property of the soil in a free government, being one of the essential rights of the collective body of the people;" it is necessary, in order to avoid future disputes, that the limits of the State should be ascertained. After ascertaining the limits, &c., it is further expressed, that "all territories, seas, &c., therein, are the right and property of the people of this State, to be held by them in sovereignty." In the third proviso of the same section, it is further expressed, "that nothing herein contained shall affect the titles or possessions of individuals holding or claiming under the laws heretofore in force, or grants heretofore made by the late King George III., &c., or the late lords proprietors, or any of them." Thus the people of this State assert their claim to the territory, &c., included in its boundaries, but without prejudice to titles or possessions held, &c., as in the said proviso set forth. Next

come the acts of confiscation, designating what persons are not citizens; and for the reasons set forth in their preambles, confiscate the property of people of certain descriptions. Amongst persons of the description whose property was confiscated, was C. F. Cossart, the person who it is stated in the bill held their offices in trust for the U. F. It has been argued for the defendants, that inasmuch as the heritable blood of the said Cossart became extinct, and he and his heirs could no longer hold the lands, that the State took them by escheat, not subject to the trust of the U. F., and that the State had a right to grant them to the defendants, not subject to the trust; and the doctrine of escheats in England is relied upon. In England escheats are divided into those, *propter nefectum sanguinis*, and those *propter delictum tenentis*. The one sort, if the tenant dies without heirs—the other, if his blood be attainted. 2 Bl. Com., 245. It cannot be pretended that the lands in question escheat to the State as coming within the latter description, *propter delictum tenentis*, because although a nation has a right to change its form of government, yet any individuals of that nation are under no obligation to submit to such change; they have a right to retire elsewhere, sell their land, &c., and take with them all their effects. Vattell, b. 1, ch. 3, pa. 80. In conformity to this principle, the Legislature of this State gave leave to such persons as were ordered out of the State, to sell and dispose of their estates, &c. Iredell, 286. It could not then be said that persons who did not wish to submit to the form of government of this State, and withdraw their allegiance from the King of England, were guilty of any crime. The other sort of escheat is where the tenant dies without heirs. Is that the case in the present instance? Does it appear that C. F. Cossart died without heirs? It does not. The fact appears to be, that he did not die without heirs; but that he became incapacitated to hold lands in this country, sometime after these lands descended upon him, because he continued to be a subject of the King of Great Britain. This case has no parallel that I am aware of in the English books. Lord Keeper Henly says, in *Burges*

v. *Wheate*, 1 Bl. Rep., 178, that if lands do escheat, not subject to a trust, he supposes it no injury or absurdity at all, *volenti non fit injuria*. The creator of the trust determines to take the conveniencies of the trust with its inconveniencies, when this trust estate was created. What was the security of the U. F. against a loss of it by an escheat of the legal estate? That the trustee would not die without heirs—that he would commit no offence in consequence of which his blood should be attained. It is true, if the trustee conveys the legal estate for a valuable consideration to a purchaser without notice, the trust estate may thereby be destroyed; but this depends upon other and quite different principles. At the time this trust estate was created, it was not contemplated that any acts of confiscation would form the medium of escheat, and thereby operate a loss of the trust estate to the owners thereof, against whom it is not pretended the confiscation laws were ever intended to operate. Suppose that before the revolution, either in England or in this country, a law had passed, declaring that persons of any particular description should no longer hold lands in this country: if the lords proprietors had seized upon lands thus situated, I think they would have taken it with its incumbrances. It is not that I imagine that the State has a right to take a greater interest, or a larger estate, than the lords proprietors could have done. With what intent did the Legislature of North Carolina pass the acts of confiscation? and what was the mischief which existed at that time? and what was the remedy intended to be applied? For such a construction ought to be put upon a statute, as may best answer the intent which the makers of it had in view. 4 Ba. Ab., 647. And that intent is sometimes to be discovered from the cause or necessity of making an act of parliament, &c., and sometimes from foreign circumstances: when this can be discovered, it must be followed with reason and discretion in the construction of an act, although against the letter of it. Idem., 648. The motives by which the Legislature were actuated in passing these laws, is set forth in the preamble of one of them—Iredell, 341—that "whereas

divers persons, who have heretofore owned and possessed lands, &c., in this State, have withdrawn themselves from the same, and attached themselves to the enemies of the United States of America, &., and also divers persons having been beyond the bounds of the United States at the beginning of the present war, have failed to return and unite their efforts for the common defense of American liberty; and it is expedient and just that every person for whom property is protected in any State, should join in defense thereof, whenever the same is threatened or invaded." Time is then given to persons whose situations are described as above, alleging favorable circumstances, to become citizens, &c., otherwise their property is to be confiscated. Thus we at once see their intent in passing the law, the mischief which prevailed, and the remedy intended to be applied. I see no reason for believing that the Legislature intended that the acts of confiscation should operate upon persons of any description, except those described in the preamble of the act. Their object was to hold out inducements to them to remain with us, by darkening and rendering as gloomy as possible their prospect, in case they left us, and sought to attach themselves to the enemies of our country. The avowed object of these acts was to increase the security which the citizens of the State had to their rights; by no means to impair it. C. F. Cossart was one of those persons described in the confiscation laws: his property was confiscated, it was said, and of course the legal title to the land in question; be it so. Was it the object of the Legislature to confiscate any rights, &c., but those of which he was possessed? If not, the operation of the acts of confiscation is commensurate to the causes which gave birth to them, and the remedy rationally proportionate and equal to the mischief. If, however, their operation is extended further, and made to include the rights of our own citizens, persons not described in the preamble I have just recited, but persons for whose benefit, in common with other citizens, the confiscation laws were passed, such extension of their operation can have no corresponding cause in that preamble, nor can be reconcilable, with any motive that actuated the Legislature

upon that occasion. Their object certainly was to secure, not to destroy the rights of their own citizens. Let us suppose it a doubtful case, and suppose also that the Legislature were present, and the question put to them, did you intend to injure the rights of your own citizens by passing the confiscation laws? Let such an answer be given as it may be supposed they, being upright and reasonable men, would give.—4 Bac., 649.—No person can imagine that the Legislature would say that, without any cause, they intended to sacrifice their fellow citizens; for I can venture to believe, that if such a sacrifice was to be made, it would be without cause. Suppose all the persons whose names have been mentioned, or whose property has been confiscated, in and by the confiscation laws, to have been naked trustees without any beneficial interest, could the Legislature have thought that those trustees would be affected one way or the other by the confiscation laws? The beneficial interest, in the present instance, is in our own citizens, nothing but a naked and unprofitable title was in C. F. Cossart. The Legislature, in all probability, knowing this, have not thought proper to make mention of his name in any of the acts of confiscation. I suppose the facts to be that all the persons who are mentioned by name in the confiscation act of 1779, Iredell, 379, not only had the legal estate in them, but had also the beneficial interest attached to it; at least that the Legislature supposed that to be the fact, by a general expression—the act then includes "all others who come within the meaning of the confiscation and this act, &c." The act certainly intended to operate only upon the interests of those who deserted the American cause and attached themselves to our enemies. It never intended, by confiscating the legal estate, a thing of no moment to Cossart, to deprive our own citizens of the trust estate. If compensation is to be made to the State by C. F. Cossart, because he attached himself to the enemies of our country, why involve in that compensation the rights of some of the citizens of the State, to whom in part that compensation is to be made? If this argument stands in need of any support, it may be derived from the proviso in

the bill of rights before spoken of—the section of which this proviso is a part, declares that all the territory, &c., of the State, is the right and property of the people of this State. The State, however, did not think proper to interfere with, or affect the titles or possessions which any of her citizens held or claimed under the laws before that time in use, or grants before that time issued. The possession of the lands in question by the U. F. or by persons claiming under them, which is the same thing, was a possession guarded by the proviso, as having been obtained in consequence of the issuing of a grant before that time, under the then existing laws of the country. Although affairs in North Carolina, as well as in the whole Union, had assumed a new aspect, the rights of individuals, before that acquired, were not forgotten. The same spirit of protection, which so strongly manifests itself in this section of our bill of rights, I am of opinion, had not taken its leave of our legislators when they passed the acts of confiscation. The 3d section of the act of 1782, before spoken of, Martin's collection of private acts, 105, declares, that the power of attorney of C. F. Cossart, dated 3d of November, 1772, empowering said F. W. Marshall to sell his lands, be admitted to probate, &c., registry in the county of Wilkes, and be as good and valid in law, as it could or might have been, had the act of confiscation never been passed. The intent of the Legislature, as far as it is discoverable in this act, was not to destroy, but to secure the rights of the complainants to the lands in question. Did they intend to amuse them by saying that the power of attorney should be valid, &c., and at the same time deprive them of that in support of which they declared it should be valid? For my own part, I attribute to them no such duplicity. It is said in Vattell, book 3d, ch. 13, p. 575, that formerly in conquests even individuals lost their lands, &c., but at present war is less terrible to the subject; things are transacted with more humanity; it is against one sovereign that another makes war, and not against quiet subjects. The conqueror lays his hands on the possessions of the State, &c., while private persons are permitted to retain

theirs—they suffer but indirectly by war, and to them the result is, that they only change masters. If an adherence to this principle would have afforded protection and a security to the rights of our citizens, in case a conquest had been made of our State by some other or third nation, how much more strongly ought the principle to be adhered to, when the people of which the complainants are a part, became masters of it, and possessed the sovereign power. It may be said, that the faith of the State is in some measure pledged to support the titles of the defendants.

Was the State consulted in one stage of the proceedings which the defendants have thought proper to adopt in procuring a title? If it was, I am a stranger to the fact. If they thought proper to enter these lands, and obtain grants for them; knowing at the same time of the claim set up by the complainants, they must abide by the consequence—the act was their own. The fifth cause of demurrer has not been argued, and I suppose is not relied upon by the defendants. I think the whole demurrer should be overruled, except that part of it as to which leave has been given to amend.

Johnston, J. The complainant sues in behalf of himself and the concerns of the Unitas Fratrum in this State. It is set forth that

The U. F. are acknowledged as an ancient Protestant Episcopal Church:—

Have no joint stock or funds:—

Have negotiated loans by their agents, for the purpose of making new establishments or settlements, and in particular for the purchase and settlement of Wachovia.—The lenders had their option either to come to this country, and receive lands to the value of their respective loans, or remain in Europe, and be reimbursed from the sale of the lands:—

That the lands of the U. F. were conveyed to complainant, by deed of lease and release, by their secretary, James Hatton; and that he was afterwards authorized to sell, and transact the business of the U. F. by act of the General Assembly, which confirmed the deeds so made:—

That he is empowered by the U. F. to institute suits, &c. :—

That Henry Cossart, known agent of the U. F. and admitted such by act of Parliament, obtained two grants of land from Earl Granville to him, as agent for the U. F., the one for 3,840 acres, more or less; the 2nd for 4,933 acres, more or less, both in Wilkes county—that these lands were granted and conveyed in trust, and that the grantee held the same in trust, as a trustee for the U. F. :—

That before the 4th of July, 1776, Henry Cossart died, leaving Christian Frederick Cossart, residing in the kingdom of Ireland, his heir-at-law, who continued to reside in that kingdom, and never came to America, and was never admitted a citizen of this or any of the United States :—

That Ch. Frederick Cossart in the year 1772, after the death of his father, the original grantee, executed a letter of attorney empowering the complainant to sell the said lands, with power of substitution; in pursuance of which he, on the 4th of October, 1774, substituted John Michael Graff, to execute the said power in his stead :—

That John Michael Graff, in pursuance of the said substitution, on the 23rd of July, 1778, sold to Hugh Montgomery, for a valuable consideration, and conveyed as well the legal estate, which was supposed to be vested in Cossart, as the equitable interest of the Unitas Fratrum in the said lands :—

That Graff received £1,000 in part of the purchase money; and to secure the payment of the balance, £1,500, took a lease of the whole lands for 500 years, to be void on the payment of that balance with interest :—

That Graff soon after died intestate, and administration of his estate was committed to Traugott Bagge, who in December, 1784, assigned the lease to the complainant in trust for the U. F.

That in the year 1778, Hugh Montgomery entered upon and took possession of the premises, and that his trustee and executors have from that time continued in possession of some part of it, but never have paid up any part of the balance of £1,500, or the interest :—

That the General Assembly have validated and confirmed the power of attorney, under which the lands were sold to Montgomery.

Demurrer 1st, that U. F. are not parties, &c.

It appears by the bill, that the complainant, F. W. Marshall, holds in trust for the U. F.—it is therefore necessary, in order to entitle the complainant to a decree, that the *ces lui que trust*, whoever they may be, should be made parties; though it is said it is not always necessary to make the trustee a party. *Kirk* v. *Clark*, Cha. prec., 275. Vin. Abr., Title Party, p. 250, fol. ed. It is said that the U. F. are known and acknowledged a religious society, by act of Parliament before the revolution, and recognized as such by our acts of Assembly since, which have confirmed their titles to certain tracts of land within this State; that they are very numerous, and it would be extremely inconvenient, if not altogether impracticable, to set forth the individual name of every member of the society—yet certain individuals by name might sue, in behalf of themselves and the rest of the society, in conjunction with the trustee; as in the case of the treasurer and managers of the Temple Brass-Work Company. 2 Cases in Equity Abridged, 168.

2d. Though it appears plainly, from the facts set forth in the bill, that the U. F. have an interest in the lands, they are not in court to claim it. It is true, F. W. Marshall says he is empowered to prosecute suits for them; but he is only their agent or attorney, and cannot maintain a suit in his own name. It does not appear to me that it is necessary to make the money lenders parties other than such as came over to this country and received lands in satisfaction for their loans. The presumption, however, as was well observed by one of the counsel for the complainants, is, that after so great a length of time the money has been paid, or the lenders satisfied in some other way; if not, they may have their remedy against the borrowers, but have no lien on the lands, as it appears the money was intended for other purposes as well as to purchase lands, and none of them have any claim on the lands, except such of them as

may come to this country with a view to settle on them. Therefore it was not necessary to make the lenders of the money parties, or any of the U. F. but such are acknowledged citizens of this State, who alone have any pretence to claim an interest in it.

3d. It was not necessary that Cossart should enter—he had no right to the possession, having only a naked trust, for the use and benefit of the U. F. who were the only persons who had the sole right of occupation and possession, under the stat. of 27 Hen. VIII.

4th. It appears that the lands in question were granted by Earl Granville to Henry Cossart, in trust, for the use of the U. F. and for no other use or purpose whatsoever; that he died some time in the year ——, and that the trust descended to his son, C. F. Cossart, who, before the Declaration of Independence, executed a letter of attorney to F. W. Marshall to sell and dispose of the lands, who substituted J. M. Graff for that purpose, and who, in the year after the declaration of rights, sold, &c. It is therefore contended that C. F. Cossart, at the time of forming the constitution and bill of rights, being an alien, his estate devolved on the people of the State, in their collective capacity, who took the estate discharged of the trust.

It would be useless to look into books for a case in every respect similar to the one now in question. The case which comes nearest to it, is where the trustee died, leaving an alien his heir-at-law: in that case it is contended the lands would escheat to the lord, discharged of the trust. And there are some cases to warrant this opinion, though the case of Eales and England, reported in Precedents in Chancery, states the law to be otherwise, that the lord would hold as trustee for the benefit of the *ces lui que trust.*

All the cases that are to be met with in the books, however, differ from this, that the trusts were created, and conveyed by a tenant who held under a *superior lord*, who was entitled to the escheat free from any trust, to the use of the grantee only. In this case Earl Granville, who was entitled to the escheat, created the trust himself, and granted the

estate in trust to the first grantee. Therefore if the grantee had died, leaving an alien his heir, and for that cause the estate had escheated to Earl Granville, I am clearly of opinion that he would have taken it charged with the trust, as he could not, on any principle either of law or equity, be allowed to avoid his own deed, so as to destroy a trust created by himself *bona fide*, and for a valuable consideration.

It is next to be considered in what manner this trust was effected, by the revolution and change of government by which Earl Granville's interest in his estate in this country became vested in the collective body of the people, when they assumed the sovereignty of the State. By the 25th section of the Declaration of Rights, after describing the limits of the State, it is declared, that all the territories within those limits "are the right and property of the people of this State, to be held by them in sovereignty." 1st proviso, saving to the Indians their rights to hunting grounds—2d proviso, reserving a right to establish one or more governments to the westward—3d proviso, "That nothing herein contained shall affect the *titles or possessions* of individuals holding or claiming under the laws heretofore in force, or grants heretofore made by the late King George III. or his predecessors, or the late lords proprietors, or any of them." This proviso should on all occasions receive a liberal construction in favor of the rights of individuals, to guard them against the encroachments of the public functionaries then established, and who by this instrument were vested with certain limited powers, from which the titles and possessions of individuals are expressly excepted. This Congress, which represented all the free inhabitants of this State, clothed with all their authority, and invested with all their rights, restrained by no law, unawed by any authority, in the plenitude of their power, have drawn a line between the proper rights in landed property of the individual citizen, and those of the collective body of the people. All titles or possessions, held or claimed under former laws, or grants, either royal or proprietory, are secured and confirmed to the individual, so that he cannot be divested of them, but on a trial in due course of law. And this is a fundamental principle, which cannot be

departed from, by any power existing under the constitution, without a direct and manifest violation of that sacred compact, to which it is the duty of every citizen to adhere and defend from every attack, however respectable the authority may be from whence it may originate.

It has been contended by the counsel for the complainant, that by this proviso the right of C. F. Cossart is saved; but this position cannot be supported from a rational or grammatical construction of that clause. The declaratory part in the first instance, vests the whole in the *collective body of the people:* the proviso then reserves certain rights to *individuals*, which can only mean individuals of the collective body of the people of this State, or of the people who were then represented in that Congress. C. F. Cossart never was one of the people of this State, nor was he one of the people represented in that Congress; he therefore cannot avail himself of any benefit or advantage from the saving in that proviso. But though it does not extend to the confirmation of Cossart's right, yet it fully comprehends the rights of the U. F., who were then inhabitants of the State, and individuals of *the collective body of the people*, who held a rightful possession, under a bona fide purchase, for a valuable consideration, and a grant from one of the late lord proprietors; not only an actual but a legal possession, under the act of the 27th H. VIII., ch. 10, for transferring uses into possession, which vests the possession in him or them that have the use. Thus the possession of these lands are irrevocably vested in the U. F. by the constitution.

It has been said by the counsel for the defendants, that the acts of Assembly, commonly called the confiscation laws, have vested the use of all lands held by persons who were not resident in this State, or some one of the United States, at the time of the Declaration of Independence, and have not since been admitted as citizens of the State. Should that be the case, it can have no effect on the interest of the U. F., which is secured to them by the Constitution, which must be admitted to be paramount to an act of the Legislature, which is itself a creature of the Consti-

tution. These acts, however, in other respects, may well stand without interfering with the Constitution; but when duly considered, will be found to vest no right to the lands of aliens in the State, other than it had under the Constitution. The confiscation acts had in view three other objects, on all of which they might operate with propriety: 1st. To direct in what manner the estates of aliens should be sold and disposed of. 2d. To confiscate and forfeit the lands of traitors, and of such citizens of this State, or of any of the United States, who had gone over to the enemy, on conviction. 3d. To restore to aliens their estates, on their taking the oaths to government, and becoming citizens.

The lands of aliens being already vested in the State, any further act could add nothing to the validity of the right of the State; but it was necessary to point out the mode of disposing and conveying these lands. In every other respect, these acts, so far as they relate to aliens, operate as acts of grace and favour, holding forth to them the generous offer of restoring their estate on their becoming citizens: And when the Legislature discovered so plainly a disposition to be not only just but generous, in regard to aliens, it ought not to be presumed that they meant to deprive their own citizens of rights, which they held under the solemn sanction of the Constitution. As the land was secured to the U. F. by the Constitution, if I am right in my position, it is unnecessary to say anything of the inquest of office relied on by the counsel.

In regard to the conveyance made to Montgomery, it is evident that Cossart, at the time of making the conveyance by his attorney, had no interest in the estate, and of course his attorney could convey nothing. But it is charged in the complainant's bill that this defect is remedied by an act of the General Assembly; so far, however, as that conveyance affects the interest of the U. F. if made by their consent, and under their authority, it is sufficient to convey their interest, and to vest the use and possession of the premises in the purchaser, his heirs and assigns; and they in return are bound to fulfil their engagements with the U. F. Thus far

I have considered the estate or interest which the collective body of the citizens of this State acquired in the lands heretofore vested in the King of Great Britain and his subjects, in the same light in which it was stated by counsel on both sides, namely, that it was acquired by escheat. But it appears to me, on such consideration as I have been able to bestow on the subject, after looking into such authorities, both ancient and modern, as I could procure, that the acquisition of property obtained by the State at the revolution was not an escheat, as defined by any elementary writers on the laws of England—none of these have omitted it, and all of them correspond with the definition given by Blackstone, vol. 2, p. 244. I shall therefore only cite that respectable authority in his own words: "Escheat, we may remember, was one of the fruits and consequences of feudal tenure; the word itself is originally French or Norman, in which language it signifies chance or accident, and with us denotes an obstruction of the course of descent, and a consequent determination of the tenure by some unforeseen contingency, in which case the estate naturally results back, by a kind of reversion, to the *original grantor*, or lord of the fee." Every person knows in what manner the citizens acquired the property of the soil within the limits of this State. Being dissatisfied with the measures of the British Government, they revolted from it, assumed the government into their own hands, seized and took possession of all the estates of the King of Great Britain and his subjects, appropriated them to their own use, and defended their possessions against the claims of Great Britain, during a long and bloody war, and finally obtained a relinquishment of those claims by the treaty of Paris. But this State had no title to the territory prior to the title of the King of Great Britain and his subjects, nor did it ever claim as lord paramount to them. This State was not the original grantor to them, nor did they ever hold by any kind of tenure under the State, or owe it any allegiance or other duties to which an escheat is annexed. How then can it be said, that the lands in this case *naturally result back by a kind of reversion* to this State, to a

source from whence it never issued, and from tenants who never held under it? Might it not be stated with equal propriety, that this country escheated to the King of Great Britain from the Aborigines, when he drove them off, and took and maintained possession of their country?

At the time of the revolution, and before the Declaration of Independence, the collective body of the people had neither right to, nor possession of the territory of this State—it is true, some individuals had a right to, and were in possession of certain portions of it, which they held under grants from the King of Great Britain; but they did not hold, nor did any of his subjects hold, under the collective body of the people, who had no power to grant any part of it. After the Declaration of Independence, and the establishment of the Constitution, the people may be said first to have taken possession of this country, at least so much of it as was not previously appropriated to individuals. Then their sovereignty commenced, and with it a right to all the property not previously vested in individual citizens, with all the other rights of sovereignty, and amongst those the right of escheats. This sovereignty did not accrue to them by escheat, but by conquest, from the King of Great Britain and his subjects; but they acquired nothing by that means from the citizens of the State—each individual had, under this view of the case, a right to retain his private property, independent of the reservation in the declaration of rights; but if there could be any doubt on that head, it is clearly explained and obviated by the proviso in that instrument.—Therefore whether the State took by right of conquest or escheat, all the interest which the U. F. had previous to the Declaration of Independence, still remained with them, on every principle of law and equity, because they are purchasers for a valuable consideration, and being in possession as *ces lui que trust* under the statute *for transferring uses into possession;* and citizens of this State, at the time of the Declaration of Independence, and at the time of making t e declaration of rights, their interest is secured to them beyond the reach of any act of Assembly; neither can

it be affected by any principle arising from the doctrine of escheats, supposing, what I do not admit, that the State took by escheat.

On consideration of this case, I am of opinion that the bill is insufficient for want of proper parties, as set forth in the demurrer, and ought to be dismissed, unless the court permit the parties to amend, by adding the proper parties. That the other causes of demurrer are not material, and ought to be overruled.

On the motion of the complainant to amend, I am of opinion, that as there has not yet been any judgment on the demurrer, that on application to the court of Morgan district, they be permitted to amend, by inserting proper parties in their bill, on paying the costs of the bill and demurrer, and one attorney's fee. See Mitford on Pleading, E. III., 146--147.

Taylor, J. The argument of this cause has been conducted in a manner which reflects much honor upon the candor and liberality of the counsel concerned, while it attests in an equal degree, their learning and diligent research. The general principles involved in this case, are unquestionably of the first importance, derived not merely from the value of the subject in dispute, which however is very considerable, but principally from the influence a decision of them must necessarily have, in ascertaining the law of the State, upon points hitherto undecided. It is on this account that my opinion, on some of the questions, will be given with diffidence: but whatever misapprehensions I may entertain, consolation is derived from the hope, that my errors will, at least, be rendered harmless, by the judgment of my brethren.

Two questions arise out of the demurrer; one as to the complainant's right, the other as to the sufficiency of the mode in which he has thought proper to prosecute it. For the sake of perspicuity, therefore, it will be proper to state distinctly the charges in the bill, under these respective heads.

1st. In relation to the plaintiff's right. On the 12th of November, 1754, Henry Cossart, as trustee for the U. F., obtained from the late Earl Granville, two grants for tracts of land in Wilkes county, upon a representation being made to him that a considerable portion of the Wachovia district, a former purchase on the same account, was barren and unproductive, although it had been paid for as arable land. Before the Declaration of Independence Henry Cossart died, leaving Christian Frederick Cossart, of Antrim, in Ireland, his heir-at-law, who became seized, as the law requires.

Christian F. Cossart, being a subject of the King of Great Britain, and resident in his dominions when the independence of the United States was declared, is supposed to have become an alien to this State, whereby the lands are vested in the State, or by virtue of the confiscation laws subsequently passed.

On the 3d of November, 1772, Christian F. Cossart, in order that the said lands might be sold for the benefit of the U. F., constituted F. W. Marshall, the complainant, his attorney for that purpose, giving him authority to appoint one or more attornies under him, with like powers. On the 4th of October, 1774, Marshall appointed John Michael Graff attorney for the same object, and with the same power.

On the 23d of July, 1778, Graff, in pursuance of his authority, sold the lands to Hugh Montgomery, who paid part of the purchase money, and received a conveyance duly executed; and in order to secure the residue, mortgaged the land to Graff, in trust for the U. F. Graff soon after died, and Trauggott Bagge, his administrator, on the 30th December, 1784, assigned the term to F. W. Marshall, then and now the agent of the Unitas Fratrum.

In July, 1778, Montgomery took possession of the land, and continued during his life time, as his trustees have done since his death, in possession of part of the same.

In December, 1779, Montgomery conveyed the lands to trustees, of whom John Brown is the survivor, in trust, for two infant children, and until their arrival at full age. At the same time Montgomery also made his last will, whereby

he charged the rest of his real and personal estate, with the payment of his just debts, and particularly the debt due to the Moravians.

The bill then charges a number of persons by name with having taken possession of the lands, pretending to derive a title under William Lenoir, who has obtained grants for the same, under the pretended authority of the land law passed in 1777, claiming the land discharged from the trust.

By an act of Assembly, passed in 1782, it is enacted, that the power of attorney of Christian F. Cossart, dated the 3d April, 1772, empowering the said Marshall to sell his lands, be admitted to probate and registry in the county of Wilkes, and be as good and valid in law, as it could or might have been, had the act of confiscation never passed.

2d. In relation to the remedy. That the U. F. has been acknowledged as an ancient Episcopal Protestant Church, by the Parliament of G. B. and the Bishops of the church of England, by a public act of Parliament, of the year 1749. As such it hath subsisted in this State about 40 years, and the title and style of the said act of Parliament, has been acknowledged and ratified by acts of the General Assembly of this State, as well as in various legal proceedings since.

The church has neither joint stock, funds nor revenue, yet at sundry times the active members among them, such as the lord advocate, the chancellor and agent, have caused loans for general concerns to be made amongst their friends and able members, particularly for new settlements, as was done in the purchase of the Wachovia district. For these objects great capitals have been raised, upon condition that the creditors should receive land in payment if they came to this State, or out of the sale thereof by him who has the fee.

F. W. Marshall, the complainant, is at present seized in fee of the lands which he is authorized to sell, and in general to conduct and manage their concerns. He is likewise authorized to institute suits in law or equity, concerning the matters complained of in the bill; and the U. F. are

bound and concluded by all such judgments and decrees as may be rendered in any court of this State, in which suits may be brought.

Besides the general prayer, the bill seeks a disclosure of the defendant's title, a conveyance of the legal estate, if they have any, to Montgomery's trustees, or a surrender of the possession for the benefit of the heirs.

If the title which Christian F. Cossart had in these lands was divested out of him, and vested in the State, it must have been either by confiscation, forfeiture by reason of alienage, or escheat for want of a legal proprietor.

If by either of these means it shall appear that the legal title has devolved upon the State, it will then be necessary to enquire whether it is subject to the trust or equitable claim, which accompanied it in the hands of Cossart?

1st. The act passed in 1782, appears to me to have precluded the necessity of investigating the question, whether the confiscation laws attached upon the lands as the property of Cossart; for, on the supposition that they did so attach, the terms of the act, though not strictly appropriate, are yet sufficiently expressive of the will of the makers, that as to this property confiscation shall not operate.

Its avowed object is to quiet the minds of those persons to whom conveyances had been made, or were to be made of any part of the lands transferred to Cossart in trust for the U. F. To this end, the purview explicitly declares, that the power of attorney from Cossart to Marshall shall be as good and valid in law, as it could or might have been, had the act of confiscation never been passed. The manifest design of the power of attorney, was to enable Marshall to perform those acts for the benefit of the society, which Cossart, being absent beyond sea, could not, on that account, conveniently execute himself. If the act had merely admitted the power to probate, the questions of Cossart's right, and the consequent goodness of the sales, might have been still left open to future discussion. But it does not rest there; it gives validity to the power, and does therefore virtually and in effect confirm and validate the sales which had been

made, or which might thereafter take place under it, so far at least as they required protection against the confiscation acts.

Thus far it seems necessary to proceed, for the sake of giving to the act a construction which is absolutely necessary to effectuate the intention of the Legislature, and one without which it is deprived of all sensible effect or useful energy; a construction, too, which is warranted by the maxim, "*Quando lex aliquid concedit, concedere videtur et id per quod devenitur ad illud.*" A person whose title has been divested out of him by confiscation, cannot sell, neither can he authorize another to sell for him; yet if an act of Assembly gives validity to a power of attorney made by him, the sale taking place under it is necessarily confirmed. Nor can it be doubted that the same consequence will follow, if an Act of Assembly restore validity to a power of attorney made by a person having good title at the time, though it becomes defective by subsequent causes. The latter is supposed to have been the situation of Cossart, when the act was passed.

The only defect of title in Cossart, that seems to have been contemplated by the drawer of the act, is the one arising from confiscation; all others, from whatever cause, are omitted. It is probable that his title was not believed to be exposed to any other objections, and if it had been, that they also would have been provided against. I infer this from the apparent futility of passing an act for the purpose of redeeming a title from defects of one kind, when it is equally vulnerable in other parts. Forfeiture by reason of alienage and escheat, are neither brought into view, nor is their possible operation guarded against; and I think that the court cannot, upon just principles of construction, extend the act, so as to remove the defects which may arise from these sources. Were the words used in the act obscure or doubtful, then the intention of the Legislature must have been resorted to in order to find the meaning; but here is no obscurity; the words are plain, their signification is obvious. Had expressions of general and comprehensive import been made use of, then the other

supposed defects might have been considered within the equity of the act; but as they have specified confiscation alone, it cannot be safely asserted that they meant to comprehend the other cases of forfeiture and escheat. A construction of this kind would seem to infringe the rule, that private statutes ought to be construed strictly. 2 Mod., 57. Whereas the construction that wrests the sales from the imperfection cast on them by the confiscation laws, is the genuine and necessary interpretation of the letter. It is also recommended by its perfect conformity to the principles of an enlarged and liberal justice. In this case, as in many others that appear in the private acts, the Legislature subscribed to the propriety of relinquishing claims under the confiscation acts, which, if vigorously insisted on, might have deprived one man of his property, for the absence or delinquency of another. They have accordingly, in several instances, abstained from appropriating to the public use, lands whereon persons having a right in conscience were disposed to settle; and in virtue of their ownership, to render to the State the fidelity of good citizens. The law in question seems to offer a merited tribute of justice to a society of men, who in the midst of many difficulties, established the workshops of industry, and diffused the habits of moral order, where, but a short time before, the silence of uncultivated nature reigned through the forest.

I will conclude this part of the case by remarking, that the Legislature had an undoubted right to renounce claims which the public, whom they represent, might derive under the various acts of confiscation. The rights of third persons, though not expressly saved, are understood in all such cases to be guarded by Equity. 8 Co., 138. Such rights, however, do not appear in any of these proceedings, and therefore the act is not impeachable on that ground. The unavoidable consequence is, that the title of these lands was either in Montgomery's trustees or in the State: if the latter acquired it by confiscation, then the act of Assembly amounts to an abandonment of such right.

2nd. Before the year 1776, it cannot be doubted that

Christian F. Cossart, being, together with the inhabitants of this State, common subjects of the same sovereign, was capable of taking by descent lands situate in the then province, and of holding them. Before that period also, the descent was cast, and Cossart was, in the full legal sense of the term, tenant in fee simple, and as such liable to execute the trusts, with which the title was incumbered. But the argument is, that by the severance of these States from the British Empire, he became an alien, and thenceforward incapable of holding any real estate within this territory; and that the consequence of his alienage, was a forfeiture of his lands to the State.

The cases upon this subject to be found in the books, do not furnish a ground of strict analogy, nor even sufficient data wherefrom direct inferences can be drawn applicable to the new and peculiar modifications proceeding from our revolution. By the term alien, the writers mean a person born out of the King's allegiance. No instance is to be found, where lands once lawfully acquired, have become forfeited on the ground of posterior alienage: the possibility of such a case seems to be excluded by the doctrine in Calvin's case, Co. Rep., and a fundamental maxim of the common law, "*nemo potest exuere patriam.*" Some of their late writers have, however, considered the inhabitants of the United States as aliens, from the recognition of their independence: and it is possible they might be considered in the same light by the law of that country, in all the consequences of that character. Whether they have subjected lands owned in that country by the citizens of this, to the principle of alienage, I am not informed. I am inclined to believe they have not, in any instance; because the late treaty with that nation recognizes in one of its articles, the holding of lands in that country by the citizens of this, and so vice versa.

It may however be thought that some of the reasons upon which the common law found the incapacity of an alien to hold lands, apply, with undiminished strength, to attach alien disability to those who became aliens by the revolution.

In both cases it would be equally impolitic to permit the permanent property in the soil to be held by those who owe no constant allegiance to the government, lest the influence thus generated might be directed against the policy and welfare of the country. But if the opinion be correct, (which is advanced by a writer of reputation, 2 Bl., though denied in Parker, 144) that the forfeiture which ensues the purchase by an alien, is intended by way of punishment for his presumption in attempting to acquire any landed property; such a reason totally fails in its application to cases circumstanced like the present: For punishment cannot with justice be inflicted, where neither crime has been committed, nor presumption manifested.

In the acquisition of his title, Cossart was passive—it was cast upon him by the operation of law, which would have continued to extend its silent protection to it, but for an event which was beyond the reach of individual agency. Had he even been an inhabitant of the State before the commencement of the revolution, and dissatisfied with the prospect of the new political arrangement about to open, writers on the law of nations say that a person so situated, may dispose of his effects, and remove wheresoever he pleases. This principle is likewise recognized in the confiscation laws of this State. If the doctrine rested upon this ground alone; if aliens were to be deprived of property purchased by them, only by way of punishment for having attempted to become proprietors, then it is clear that such a consequence ought not to be extended to persons who take property before the separation of the United States from Great Britain. But with whatever reasons of policy or justice confiscation may have been extended to those who abandoned their country in the hour of danger, and neglected to avail themselves of the privilege of selling; or to those who, after having pledged their allegiance to the new government, united their hostile exertions with the enemy, no blame can, with propriety, be imputed to the persons who thought proper to remain in their own country. If forfeiture of the lands of such persons, arising from their incapacity to hold, be the conse-

quence of the revolution, it must then be rested upon the single ground of public policy, from which I do not apprehend that any principle arises which warrants the application of more rigorous or summary justice to divest their titles, than might have been called forth had they purchased, being aliens. I cannot discern any reason why the law of forfeiture on account of alienage, if it is applied to these persons, should not be accompanied with the same restrictions, which belong to it in the case of an alien purchasing before or since the revolution. The one may purchase but cannot hold; the other was at the time competent both to purchase and hold, but his capacity for the latter is supposed to be destroyed by supervenient causes. An alien, according to the common law definition, does by purchase acquire the freehold, and become tenant to the lord of whom the lands are holden. And until office found, he is recognized as a tenant for many purposes: therefore survivorship shall take place between an alien and a subject, who purchase in joint tenancy, which continues until it is severed by the office; because the freehold being in the alien by livery, shall only be divested by the solemnity of an office. Dyer, 283. On a covenant to stand seized, an use will arise for an alien. Godb., 275. An alien tenant in tail may suffer a recovery and dock the remainders. Goldbor., 102. Although common recoveries are deemed to some intents fictitious, yet the writ of entry must be brought against one that is actually seized of the freehold by right or by wrong. Pigot, 28. Therefore unless an alien was considered as seized of the freehold, he could not be a good tenant to the præcipe. It is also generally true, that wherever an alien takes by his own act, the freehold is considered as in him, until an office, although he is not permitted to take by an act of law, even for the benefit of the King.

From these authorities and this reasoning, I think these conclusions are deducible: That in the application of the law of forfeiture to Christian F. Cossart, he ought to be considered in the light of an alien purchasing lands in this

province or State, either before or since the revolution—that in the one case, the lands would not have been divested out of him, and vested in the lords proprietors; nor in the other in the State, without an office. That this solemnity not having been performed, no title of forfeiture has accrued to the State.

3d. Escheat for want of a legal proprietor. The general acceptation of the term escheat, according to the common law, supposes that the person last seized has died without heirs, or that his blood is attainted. In the one case the writ of escheat must shew the death of the tenant. 10 Viner, 155. In the other, there must be judgment of death given in some court of record against the felon found guilty, by verdict or confession of the felony; or it must be by outlawry of him. Bac., Use of the Law, 38. It denotes an obstruction of the course of descent, and a consequent determination of the tenure, by some unforeseen contingency, in which case the land *naturally* results back by a kind of reversion to the original grantor or lord of the soil. 2 Bl., 244. According to another writer, it imports something happening or returning to the lord on a determination of the tenure only. Wright on Ten., 117. The word originally signifies anything coming accidentally or by chance; and in such sense comprehending casual obventions and forfeitures of all kinds. In the general and comprehensive sense of lands left without any lawful proprietor, from whatever cause, it is probable that the Legislature used the term, when, in 1789, they vested all escheats in the University. But the questions whether the lands of Christian F. Cossart were comprised under this general denomination? whether they were left without any lawful proprietor, and devolved upon the State as an escheat? I conceive it unnecessary for me to give an opinion upon, because there are other grounds upon which I can decide this case, in a manner satisfactory to my own mind; and without necessity I should feel reluctant in giving an opinion upon a point, respecting which the greatest lawyers have disagreed, and which may probably be the only question in some future case. Its

importance entitles it to a separate and solemn argument and deliberate investigation; and it might be unsafe to decide it, but under all the light which these may reflect upon it.

4th. It is contended that the State has taken this land discharged of the trust, in analogy to the prerogative of the King, who is incapable of being a trustee; and to the lord by escheat, who, coming in by title paramount, and in the *post*, takes the land free from any collateral charges, wherewith the tenant has incumbered it. To maintain these positions, and the consequences drawn from them, a great variety of authorities has been introduced; but I cannot, after a careful perusal, collect from them that the law is so settled at this day. Assuredly the doctrine is not reconcilable with the broad and liberal principles adopted by this court, in the consideration of trust estates; nor with the reason and policy of making the statute of uses.

As trusts are said to be the mere creatures of a court of equity, into which they were drawn on account of some scruples which the common law judges could not surmount, a system has been steadily persevered in with respect to them, most likely to effectuate their intent; and at the same time to avoid those inconveniences which had rendered uses odious. It could not therefore be just to suffer them to fail, and the right intentions of the parties to be undermined, by reason of any disability in the trustee. In this court he is properly considered as the mere instrument of conveyance, and can extinguish the right of *ces lui que trust* only in a single instance, that of conveying to a purchaser without notice of the trust, and for a valuable consideration. In conformity with this equitable notion the decisions have been extended to a great and beneficial length. Where a trustee has been incapable through some legal disability to convey or execute an estate, the court of chancery has removed him out of the trust. 2 Chan. Ca., 130.

Wherever there is a defective or improper trustee, chancery acts as if there were none. 1 Brown Cha. Ca., 81. And in every instance the court is solicitous to carry into effect the intention of the person who is really the owner

of the land, and to attach the trust to the land itself, rather than make it dependent on the personal competency of the trustee. The source of all complaints against uses, as they prevailed previous to the statute of H. VIII., was, that the feoffees were considered as the true owners; and the mischiefs which flowed from them, under the influence of this opinion, would result in an equal degree from trusts, were the estate of the trustee held in greater estimation than that of the *ces lui que trust.* That statute divested the possession out of the person seized to the use, and transferred it to the *ces lui que* use, with a view of annulling those inconveniences which were occasioned by considering the feoffee as the real owner; which character subjected him to the performance of the feudal duties, gave dower to his wife, placed his infant heir in wardship to the lord, and forfeited the estate upon his attainder.

The principle upon which the doctrine in Chudleigh's case is founded, is, that persons coming in by a paramount and extraneous title, are not seized to an use, as the disseizor, abator or intruder of the feoffee, or the tenant in dower, or by the courtesy of a feoffee, or the lord entering upon the possession by escheat; none of these claiming under the feoffee, but being, as the law expresses it, in the *post.* When that case was decided, trusts had not undergone much discussion; their principles were but partially developed; and the foundation only of that system laid, by which they have been since made to answer the beneficial ends of uses, without their inconveniences. In justice and reason, the title of persons so claiming was no better than that of the heir or aliense. Every volunteer claimant, and every claimant with notice, whether they come in the *per* or in the *post*, ought to be bound to the performance of the trust. And in relation to this point, the sentiments of Lord Mansfield are applicable: "I apprehend the old law of uses does not conclude trusts now; where the practice is founded on the same reasons and grounds, the, practice is now followed. Its positive authority does not bind where the reason is defective; more especially that part of the old law of uses which did not allow any relief to be given for or against estates in the

post, does not now bind by its authority in the case of trusts." 1 Bl., 1155.

The decisions, so far as the point has been decided, justify these sentiments. If a trustee commits felony, though the lands are forfeited at law, yet *ces lui que trust* may have relief in equity; so if he commits treasons. 3 Com., 386. The trustee of a legacy dying before the legacy is paid, shall not prejudice the legatee; so if a trustee of land dies without heir, though the lord by escheat will have the land at law, yet it will be subject to the trust in equity. Prec., ch. 202.

If A. put out money at interest in the name of B., who afterwards becomes *felo de se*, A. may be relieved against the King, upon the statute 33 Hen. VIII. 1 Eq. Ca. Abr., 384. The general principle which prevails in a Court of Equity, is to consider the trustee as having the legal ownership so far only as to be beneficial to *ces lui que trust*, and not subject to any advantage or disadvantage which may arise from the trustee personally, as having the legal estate. These authorities derive countenance and support from Gilbert on Eq., 172. 1 Brown Cha. Ca., 204.

Nothing can be fairly collected from the case of *Burgess* v. *Wheate*, 1 Bl., 123, or from Fonblanque's note to Gilbert's Treatise, to impeach the soundness of the doctrine. In the former it was only decided against the opinion of Lord Mansfield, that the crown could not in equity, upon a failure of the heirs of *ces lui que trust*, claim against a trustee by escheat, if he had the legal estate in him, upon the principle that the title by escheat could only arise where there was a defect of a tenant; but that the ground of escheat failed, whenever there was a tenant, whether he were beneficially interested or not. The court did not decide, nor did the case present the question, whether a lord by escheat was discharged of the trust, as against the *ces lui que trust:* but the opinion of the majority of the court was, that if an estate, liable to a trust, come to the King, the land will, in equity, be equally bound by the trust in the hands of the King, as of a common person.

If, then, the persons beneficially interested in this case possessed a right against the State, notwithstanding the escheat from their trustee, the cause between the present parties ought to be decided without prejudice, from the consideration that the plaintiffs can have no remedy from the State. For whether such a remedy against the State existed or not, which could only properly be tried where the State was a party, I should think that this court might furnish them with an adequate remedy against persons claiming under the State with notice of the trust, which is the character given by the bill to these defendants. The doctrine of prerogative, if introduced here to govern questions relative to the rights of the State, should not be extended further than just analogy and a temperate application of its principles will warrant. It should be made subservient to the purposes of justice, while it protects the immunities of the State: and such of its consequences as promote these objects, should be adopted with the doctrine itself. Now, though a suit will not lie against the King, yet his prerogatives are not transferred with the property to his grantee. Thus his patentee shall not take advantage of the maxim, *nullum tempus occurrit regi*. Poph., 26. If the King grant lands which he has seized without title or matter of record, the person having right may enter upon the grantee without petition. Skin., 608. If the King enters without title, or seizes land by a void or insufficient office, he is no disseizor; but if by letters patent he grants the lands so seized, and the patentee enters, he is a disseizor; because he has time to enquire into the legality of his title, which the King is supposed to want leisure for. 5 Bac., 607. "In all cases where the party grieved may have a *monstrans de droit*, or *travers* against the King, there if the King granteth over the land, the party grieved may enter, or have his action against the patentee." 4 Rep., 212. Viewing these authorities as creating a difference between the crown and its grantee, and so authorizing a full legal remedy against the latter, where only the partial remedy of a petition or plea of right was allowed against the former; and considering that

there are cases, where our Legislature has sanctioned bills in equity for injunctions against the State, I am led to the conclusion, that the present defendants are not privileged from answering by reason of deriving their title from the State.

The objections to the form of the present bill have been rested upon the following grounds of argument: That all persons materially interested in a suit in equity, ought to be made parties, plaintiffs or defendants, however numerous they may be, so that a decree complete and final may be made. That the persons who advanced money for the purchase of these lands being entitled to satisfaction, either in lands if they came to this country, or out of the money arising out of the sale of the lands if they did not come, ought to have been parties to the bill, and that the members who compose the U. F. ought to have been named in the bill, and their interest stated. That the creditors who advanced money, together with the sums respectively loaned by them, should likewise have been stated, in order that the court might see the nature and extent of their interest. And it is particularly insisted upon, that although the bill is brought by Marshall, in behalf of himself and the concerns of the U. F., yet it would be unjust to decree for all the members, since they alone are beneficially entitled, by whose assistance the lands were purchased.

To ascertain the due weight of these objections, it will be necessary to enquire who the parties concerned in interest really are, and what are the ends and purposes of the bill?

The U. F. is an association of persons voluntarily submitting to certain regulations, with a view of promoting objects of a religious and social nature. They have neither incorporation, joint stock nor funds; but they prosecute, under the influence of a sentiment common to the whole community, certain ends which they deem necessary to the prosperity of their society. If, in their native country, they possessed not the assurance that the toils of their industry would meet an adequate reward, or that free toleration would be allowed to the exercises of their religion, it was natural to seek a more favored clime, where new settlements for the accommodation of their members might

be formed, under happier auspices. With this view the lands purchased from Lord Granville were obtained, by means of loans procured from their able members, by the lord advocate, chancellor and agent, and active members. The security for the money advanced, consisted in their agent's responsibility to convey lands to them if they came over to this country, or to sell lands and reimburse them out of the proceeds, if they did not. So long as the title of the lands purchased by their agent remained in him, the creditors had an option, either to compel him to convey to them in satisfaction of their respective debts, or to sell, and by that means satisfy them. But when he, clothed with full powers for that purpose, made sale of the lands, the rights of the creditors were necessarily abridged to a simple claim of the money which they had advanced. In the specific lands, which form the subject of the present controversy, it is apparent that the creditors, whoever they are, can have no interest. All they can ask or obtain, is the money due on the sale; and this they can only receive in the event of its appearing that Graff's sale to Montgomery conveyed a good title. If, on the other hand, Graff had no right to sell, the steps by which that conclusion is arrived at, lead also to this other, that the complainant has no right to the land. The bill accordingly seeks a decree that the defendants may convey the legal title, if they have any, to the trustee of Montgomery, or that they may deliver possession of the land to the trustee, for the use and benefit of the infants; and that the executor of Montgomery may pay the complainant in trust for the U. F. the principal and interest due upon the purchase. Should the claims of the complainant be established by a decree, his character will be that of a trustee for so much money as is recovered for those creditors who made advances for the Wachovia purchase. It is then to be examined, whether the principles of equity require, or the authorities cited prove, that all the persons who lent money ought to have been parties to the bill.

It is expedient for several reasons, that all persons con-

cerned in a demand should be called before the court. If it appears upon the face of the bill, that there are other parties whose rights may be affected by a decree, it would be vain and useless to go on to a decision of the cause: For a decree made under such circumstances, is liable to reversal, or at least none but the real parties, and those claiming under them, are affected by it, and the persons who are left out may vex the defendants with another suit. Wherever any of these inconveniences may follow, from the omission of parties, the general rule ought to be observed, and all the parties interested, however numerous they may be, should be brought in.

Unless this case, under all its circumstances, comes within some of the exceptions to the rule, the demurrer on this ground must prevail. It will be proper, in order to ascertain this question, to examine in the first place the cases cited, by which the rule itself is illustrated. The case of *Leigh* v. *Thomas*, 2 Vesey, 312, the substance of which is, that a bill was brought for an account of prize-money, and to have two shares paid to two plaintiffs, as agents, which they claimed under the general articles on which the cruise was set on foot. In them there was no appropriation of shares to persons afterwards appointed agents, but a general provision that the crew should have liberty to appoint two agents. The plaintiffs were appointed agents by a subsequent deed, signed by sixty-four out of eighty, the number of the whole crew; and they brought this bill in behalf of themselves and of the said sixty-four. Upon a demurrer for not making the whole crew parties, the master of the rolls was of opinion that the whole crew ought to have been made parties, because the subsequent agreement could not be binding on them; and that they had a right to litigate the claim set up by the plaintiffs of two shares on their own account. This decision is clearly justified by the reasons on which the rule is founded. No decree made in the case could have been binding on the absent part of the crew, who had given no authority for the suit, and whose rights were improperly attempted to be drawn into controversy without their consent.

The case of *Kirk* v. *Clark and others*, Finch's Prec., 275, was where a bill was brought by a trustee to compel the specific performance of marriage articles, and the *ces lui que trust* was not made a party; and therefore it was prayed that the cause might not go on, after opening the bill and answer, because if the bill should be dismissed, the *ces lui que trust* would not at all be bound by it; and so the defendants liable to another suit for the same cause —and the *ces lui que trust* was directed to be made a party. It was observed in that case, that bills had been sometimes allowed which were brought by a *ces lui que trust*, without making the trustee a party; yet that was upon the *ces lui que trust's* undertaking for the trustee that he should conform to what decree should be made, which might be reasonable, he having no interest at all, in his own right; but a trustee could not so undertake for his *ces lui que trust*.

The principle and policy of the rule are again manifest in this case: The rights of the person substantially interested, shall not be litigated without making him a party, nor shall the suit be tried in the absence of a party nominally concerned, if by possibility he may renew the contest. The *ces lui que trust* may undertake that the trustee shall conform to the decree, because the former is really the true party; but a trustee cannot so bind the *ces lui que trust*. If the *ces lui que trust*, instituting a suit in his own name, may proceed to a decree upon his undertaking that the trustee shall conform to it, by the same reason may the latter prosecute a suit where the *ces lui que trust* undertakes for himself. It can be of no importance by whom the suit is brought, if the party not before the court is bound, either by himself, if the *ces lui que trust* or by the *ces lui que trust*, if the trustee, not to disturb the decree which shall be made. This reasoning is of force in the present case, when connected with the statement in the bill, that the complainant is authorized to institute suits in law or equity, concerning the matters complained of, and that the U. F. are bound and concluded by all such judgments and decrees as may be rendered, &c.

The case in Bunbury, 53, and that of *Hanne* v. *Stevens*, 1 Vernon, 110, do further establish the general doctrine, and the reasoning in the latter case demonstrates its propriety, that a defendant, as a trustee for three persons, is not bound to answer a bill brought by one of the *ces lui que trusts;* for otherwise he might be thrice called to an account for the same matter.

But the circumstance of the complainant being authorized to bring suit for the others concerned in interest, and of the present suit being brought to recover the money for which the land sold, seem to bring the present case completely within the principle of those wherein it has been held that creditors seeking an account of real and personal estate for payment of their demands, a few suing on behalf of the rest, may substantiate the suit. The following case is very applicable, both in authority and the reasons on which it is founded: Finch, 592, *Chancey* v. *May*. This was a bill brought by the present treasurer and manager of the Temple Mills Brass Work, in behalf of themselves and all other proprietors and partners in the first undertaking, except the defendants, who were the late treasurer and managers, being about thirteen in number, and was to call them to an account for several misapplications, mismanagements and embezzlements of the copartnership, in the late South Sea times, to a great amount. The copartnership consisted originally but of eighteen shares, but those eighteen shares, in the year 1720, were split and divided into five hundred. The defendant demurred for, that all the rest of the proprietors were not made parties, and so everyone had the same right to call them to an account, and then they might be harrassed and perplexed with multiplicity of suits. But the demurrer was disallowed: 1st. Because it was in behalf of themselves and of all others the proprietors of the said undertaking, except the defendants, and so all the rest were in effect parties—2d. Because it would be impracticable to make them all parties by name, and there would be continual abatements by death and otherwise, and no coming at justice if all were to be made parties.

With equal propriety it may be said in the present case, that the suit being brought by Marshall, in behalf of himself and the concerns of the U. F., all the persons who have an interest in the money advanced, are virtually and in effect parties, and if continual abatements would not be the necessary effect of inserting the whole, at least endless delays might be expected as the natural consequence.

It is needless to multiply authorities upon this part of the case, for in every view of it presented to my mind, the suit is properly instituted by Marshall, in behalf of himself and the others concerned. From this mode I cannot foresee that any inconvenience will arise, any deterioration of the rights of others, or any needless and unjust vexation to the defendants; for a decree, in the present form of the bill, will forever preclude the persons who are interested, by having advanced the money to effect the purchases, from suing the party defendants, on the grounds made by the present bill.

If by the judgment of the court, the demurrer should be overruled, and the defendants required to answer—if the complainant's power to prosecute suits for the U. F. and his capacity to bind them by a judgment, should then be doubted, the court before whom the cause is tried, may, and no doubt will, require such proofs of his asserted authority as will clothe their decree with conclusive effect.

Upon the whole of this case, the general conclusions of my opinion are, 1st. That the private act passed in 1782, did effectually and completely clear Cossart's title to the lands which he held as trustee for the U. F., from all defects and imperfections, to which any of the confiscation acts passed by the Legislature of this State might, before that time, have subjected it.

2d. That the State gained no title by forfeiture on account of alienage, for want of an office, or something equivalent; even if the principles of the common law warrant the extension of this doctrine, to persons who lawfully held lands in this State prior to the revolution, and who have not since become citizens of this State, or any of the United States—

a proposition which I am not at present prepared to admit, in the extent insisted on.

3d. Waiving any positive opinion upon the question whether the lands escheated to the State, under the comprehensive notion of the term, which casts upon the sovereignty of the country, all titles to lands, which would otherwise be destitute of a lawful proprietor, I am decidedly of opinion, that even such a legal title would be subject to the equitable right of the *ces lui que trust*, and is, in the hands of persons claiming under the State, subject to the equitable remedy of the *ces lui que trust.*

4th. That the manner in which the complainant's bill is framed with respect to parties, is warranted by reason, and sanctioned by authority, consequently that the demurrer ought to be disallowed.

NOTE.—On the first point, see *Vann* v. *Hargett*, 2 Dev. & Bat. Eq., 31. And on the last point, see *Van Norden* v. *Primm*, 2 Hay. Rep., 149; *Belloat* v. *Morse*, Ibid., 157.

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When a devise would give to heirs what they would take without it, they shall be in by descent. But where the devise makes an alteration in the limitation of the estate, the heirs take by purchase.

A devise to the widow for life with remainder to the testator's three daughters, (his heirs-at-law) their heirs, executors, administrators and assigns makes the daughters joint tenants.

This cause originated in the Court of Equity for Wilmington district. The complainants by their bill allege, that Rufus Marsden, on the fifth day of March, 1749, duly made and published his last will and testament, containing, amongst other things, the following devises:—"I give, grant and devise, and bequeath unto my loving wife, Allice

Marsden, all my houses and lots in the town of Wilmington, in the province of North Carolina, to have and to hold to her, my said wife Allice Marsden, for and during the time of her life; and after her decease, to the use of my three daughters, namely, Hannah, Allice and Peggy, and to their heirs, executors, administrators and assigns forever, and to no other use or uses whatsoever.

"*Item*, I give, grant, devise and bequeath unto my loving wife, Allice Marsden, all my personal estate, of what kind or nature whatsoever, and after her decease to the use of my three daughters, Hannah, Allice and Peggy, to their heirs, executors and assigns for ever, and to no other use or uses whatsoever." And soon afterwards died, leaving his widow and three daughters living at his death.

Hannah, one of the daughters, intermarried with Arthur Mabson, in 1754, by whom she had issue, Allice, one of the complainants, and shortly afterwards died—Arthur Mabson, her husband, also died before Allice the widow.

In 1758, Allice Marsden, the widow, died, leaving the other two daughters, Allice and Peggy, and the grand-daughter, Allice, living.

In 1765, Allice, the daughter, intermarried with Benjamin Herron, who died soon afterwards.

In 1785, Peggy, the other daughter, intermarried with John Lordan, one of the defendants, by whom she had issue, John Lordan, another of the defendants, and died.

In 1772, Allice, the grand-daughter, intermarried with Samuel Campbell, the other defendant.

After the death of the widow, Allice and Peggy, the daughters, took possession of the whole estate, and they and the said John Lordan have remained in possession thereof ever since, and enjoyed the rents and profits of the same.

The complainants claim one-third part of the estate of Rufus Marsden, and the profits accrued since the death of Allice the widow, and pray an account and division.

To this bill the defendants demurred, and for cause stated, that Rufus Marsden, in the bill mentioned, devised the

property claimed to his three daughters, Hannah, Allice and Peggy, as joint tenants, and that Hannah died, Alice and Peggy surviving.

Wright, in support of the demurrer. It is contended on the part of the defendant, 1st. That the devisees in the will of Marsden, took by purchase and not by descent. 2d. That they took an estate in joint tenancy, and not as tenants in common.

1st. They took by purchase.—Although the general rule be acknowledged, that where the heir takes nothing more by the devise than he would without it, he shall be considered in by descent, (for reasons however which exist not in this country.) Yet wherever the ancestor devises the estate to his heir, with other limitations than the cause of descents would direct, or makes use of words which constitute and convey an estate, and which draws with it other incidents and qualities, the heir to whom the same is so devised, shall be said to be in by purchase.—Hob., 29, 30; Gilb. on Devises, 112, 113; Powell on Devises, 439; 2 Bl. Com. by Christian, 241, note; 1 Cro., 431. The words made use of by the devisor are such as convey an estate in joint tenancy; the incidents and qualities of which differ from an estate in coparcenary. Parceners cannot have an action of waste against each other by virtue of the stat. of West. II. nor can they have an action of account, by the 4 Ann, as joint tenants and tenants in common. Parceners *alone* were compellable by common law to make partition; they have but one estate, and do not hold by distinct moieties as tenants in common, and there is no survivorship among them as among joint tenants. Therefore wherever an estate is devised by words which constitute either an estate in common, or in joint tenancy, though to the persons who are the heirs of the devisor, they take by purchase and not by descent; because the qualities incident to those estates, are not incident to such an estate as the heirs would take, if considered in by descent.

2dly. The devisees took as joint tenants, and not as ten-

ants in common. Joint tenancy was anciently favoured by the laws; and although the reasons which induced a construction of deeds and wills, which tended to the support of joint tenancy, do not exist with the same force as formerly, yet the rule is still the same. That wherever the estate is given to two or more, without explanatory words, the persons to whom it is given take as joint tenants; for notwithstanding the reasons have failed upon which the rule was founded, the rule itself still exists, in the same manner as all other rules of law exist and are in force, without having the reasons on which they were built to support them in their operation. This principle is recognized by Powell in his Treatise on Devises, 356. The following authorities apply, to prove that the words of Marsden's will convey to the devisees an estate in joint tenancy: 3 Lev., 127; 1 Leo., 112, 113, 315; Cro. Eliz., 431; Gilb. on Devises, 113; Powell on Devises, 439; Owen, 65.

No instance can be produced where such words, without some other words severing the estate, were held either in law or equity to convey a tenancy in common. That the rule is still the same as formerly, the opinions of the first law characters in the kingdom of Great Britain, the late commentator on Coke upon Littleton, will confirm——— Co. on Litt., 190, 6 note; 3 Ves. jun., 628.

It is also to be observed, that the construction of wills is the same in a court of equity as in a court of law.—2 Bur., 1108; 3 Bl. Com., 435; 2 Com., 537; 2 Brown, 233. It is therefore concluded, on the part of the defendants, that the demurrer should be maintained, inasmuch as the authorities prove that the words made use of by the will of R. Marsden, convey an estate in joint tenancy; which drawing with it other incidents than such as are attached to an estate in coparcenary, places the devisee in of an estate by purchase, and not by descent.

Haywood, for the complainants.

1st. The rule of construing wills at the present day, is, that the intention of the testator shall prevail. 3 Bur., 1634; 3 Atk., 619; 5 Bur., 2703; 2 Bro. Ch., 51.

2dly. The old rule, which I do not dispute, was established in very ancient times, when the judges favored joint-tenancies, in order to avoid multiplication of tenures and of services. Salk,, 158, 392. 9 Mod., 159.

3dly. As the tenures wore off the rule was gradually departed from, till the intent and not the words became the governing principles, and induced the judges to construe the words as conveying a tenancy in common; first in wills and then in deeds. 2 Ves., 252, 259; 2 Atk., 121; 3 Atk., 731; 1 P. W., 14; Cow., 660.

4thly. If the intent is now to govern, the daughters took as tenants in common, for the intent of their father was that they should take as tenants in common, and not as joint-tenants.

1. For the same reason as in 2 Ves., 252, a settlement upon children. He could not mean that if one died leaving children, that those children should not have anything.

2. He was a layman, and not knowing the use of words has thrown in a number, hoping they would discover his intentions, "Executors." How could the property go to the executors of Allice, if it survived upon her death? Suppose a devise by Allice to her executors.

3. "Administrators." How could it go to them, if it survived upon her death?

4. "To no other use or uses." If it survives does it not go to those who are not the heirs of Allice, to her sisters instead of her child, and directly contrary to the intention of the testator, and the words of the will?

5thly. These are the very words the Legislature has used to sever the joint-tenancy. Iredell, 489.

6thly. In the clause relative to the personalty, the same words are used, and no one can doubt the testator's intentions, that the part of each child should go to her executors, consequently that a will might be made of it, and for want of a will that it should go to administrators. The same words in the same will must of necessity have the same meaning.

By the Court. It is not doubted, but that if a person devises land to one who is his next heir, and his heirs, the devise is void, and the heir shall take by descent; or if a testator devise that his lands shall descend to his son, the devise is void, and the devises shall be in by descent. Powell on Devises, 427, 428, and the authorities there cited. 1st. Because it was for the benefit of creditors. 2d. Because the lord would have been defrauded of the fruits of his seigniory, the consequence of descent. But wherever the devise makes an alteration of the limitation of the estate, from that which takes place in the case of descent, then the principle ceases to operate, and the heir takes by purchase. Pow. Dev., 439. In the present case, if the lands, &c., had descended to the three daughters, they would have taken as coparceners. Survivorship therefore never could have taken place between them. But the testator, after giving a life estate to his wife in the premises, gives, grants, &c., the use of them to his three daughters, named Hannah, Allice and Peggy, and to no other use or uses whatsoever.

It is admitted that the word made use of in this devise, in feudal times, would have created an estate in joint-tenancy—the reason assigned why joint-tenancies were favored in those times, is, that it prevented a multiplication of tenures. But it is said, that as the feudal tenures wore off, this rule has been gradually departed from—that the intent and not the words should form the rule of decision. It is true, that joint-tenancies are less, and tenancies in common are more favored than they anciently were, particularly where a father is making provision for his children, and makes use of any words, which a court can properly lay hold of and make instrumental for that purpose. 1 P. W., 14; 2 Atk., 122; Cowp., 660; 2 Ves., 252, 256; 3 Atk., 731. But every one of these cases prove, that an estate created by the same words that are made use of in the present instance, must be a joint-tenancy. The ground of decision in every one of them was particular words made use of, from which the court collected an intent in the devisor to create a tenancy in common; such as, "equally to be divided, &c.,"

"respectively, &c." But we know of no case, even in a will or in deeds, which derive their operation from the statute of uses, where the same or similar words are not made use of, that a similar determination has taken place : so that these cases are rather exceptions to the general rule ; and as no words are made use of here that can bring the case within any of the exceptions, it must be considered a joint-tenancy.

Can it be presumed, in the case of *Regden* v. *Valliers*, as reported in 2 Ves., 252, and 3 Atk., 731, above cited that Ld. Hardwicke would have made the same determination, had the words "equally to be divided between them," not have been made use of in this deed ? Or would his reasoning have been applicable to the case, had these words been omitted ? Although the reasons that formerly favored joint-tenancy, do not hold now so strong as formerly, yet the rules to which they gave rise in many respects exist. Pow. Dev., 355—altho' frequently inconveniences are felt from them. We therefore think that the words made use of in this devise create a joint-tenancy, there being no particular circumstances or words in it, from which an intent can be collected that the testator meant to convey a tenancy in common. Pow. Dev., 439 ; Cro. Eliz., 431 ; 2 Vern., 545 ; 3 Lev., 127, 128 ; Co. Litt., 189 ; 1 Lev., 112.

Bill dismissed with costs.

Judge TAYLOR gave no opinion, having been of counsel in the cause.

NOTE.—On the first point, see *University* v. *Holstead*, 2 Car. Law. Repos., 406 ; *McKay* v. *Hendon*, 3 Murph. Rep., 209.

On the second, see act of 1784 (1 Rev. Stat., ch. 43, sec. 1) by which the principal incident of joint-tenancy, to wit, survivorship, is abolished.

SAMUEL BICKERSTAFF v. HENRY DELLINGER.—Page 299.

The attachment law does not require the plaintiff to swear positively to the amount of his debts; therefore it was held good when the plaintiff swore that he had good reason to believe that the defendant had, in company with others, endamaged him to the amount of £219.

If the plaintiff in attachment fail to give bond or file an affidavit, it should be pleaded in abatement; it cannot be taken advantage of by writ of error.

This was a writ of error brought in Morgan Superior Court of Law, to reverse a judgment detained by the defendant against the plaintiff in error in Lincoln county court, by original attachment, in these words:—

"Whereas Henry Dellinger hath complained on oath to me, Daniel M'Kissick, a justice assigned to keep the peace for the county of Lincoln, that he has just cause to suspect that Samuel Bickerstaff, in company with others, hath endamadged him to the amount of two hundred and nineteen pounds ten shillings; and oath having been made, that the said Bickerstaff has removed himself out of your county, or so absconds or coneals himself, that the ordinary process of law cannot be served on him: and the said Henry Dellinger having given bond and security, according to the directions of the act of the General Assembly in such case made and provided, you are therefore commanded that you attach the estate of the said Bickerstaff, if it be found in your county, or so much thereof, repleviable on security, as shall be of value sufficient to said damages and costs; and such estate so attached in your hands, to secure, or so to provide, that the same may be liable to further proceedings, thereupon to be had at our next Court of Pleas and Quarter Sessions to be held for the county of Lincoln, on the first Monday in July next, so as to compel the said Samuel Bickerstaff to appear and answer the above complaint of the said Henry Dellinger, when and where you shall make known to the said court how you shall have executed this

writ. Witness Daniel M'Kissick, a member of said court, this 17th May, 1783, and in the 7th year of American Independence.

"DANIEL M'KISSICK, J. P. (Seal.)

"To the sheriff of Lincoln County to execute, or James Martin, constable." On which was endorsed the following return:—"Levied on 300 acres of land, on the waters of Buffaloe Creek.

JAMES MARTIN, Constable."

The following affidavit was returned at the same court:

STATE OF NORTH CAROLINA, }
Lincoln County. }

This day came Henry Dellinger before me, a justice assigned to keep the peace for said county, and made oath that he has reason to suspect that Samuel Bickerstaff, in company with other tories in the British service, did come to his house on the 26th day of January, in the year 1781, and took, destroyed and carried away the following articles, to wit:——300 gallons brandy, at 8s—£120—and other articles which are mentioned in the affidavit, amounting in all to £219 2s. And that he never received them, or any of them, nor any value for the above mentioned articles.

Sworn to and subscribed this 17th May, 1783.

HENRY DELLINGER.

Daniel M'Kissick, J. P.

The case stood thus on the docket of the county court:

Henry Dellinger, vs. Samuel Bickerstaff, } Or: Attachment—Jury charged—Verdict £219 2 and costs.

On which execution issued, and the land mentioned in the return on the attachment was sold.

The following errors were assigned by Mr. John Williams, counsel for the plaintiff in error, to wit:

That no bond or security for satisfying all costs which might have been awarded to the said Samuel, in case the said Henry had been cast in the said suit, and also all damages which might have been recovered against the said Henry in any suit or suits which might be brought against

him for wrongfully suing out such attachment, was ever taken or returned to the said County Court.

That the said Henry never swore to the amount of his damages or demand in the said suit, to the best of his knowledge or belief.

That there was no complaint made on oath to any justice of the peace of the said County Court, that the said Samuel, at the time of granting such attachment, had removed, or was removing himself out of the county privately, or so absconded or concealed himself that the ordinary process of law could not be served on him.

That the original attachment does not appear to be granted by any justice of the County Court of Lincoln, or any judge of the Superior Court of law.

That the said original attachment was directed to the sheriff of Lincoln County, or to James Martin, constable; and that by the record aforesaid, appears to have been levied by the said James Martin, as constable, on land, when, by the law of the land, the same attachment ought to have been directed to the sheriff or coroner of Lincoln county, and not to any constable.

That there is no declaration filed and remaining of record in the said suit, and that the complaint, as it appears in the affidavit filed in the same suit, and the said original attachment, and the matter thereof, is not sufficient in law to maintain the said action.

That there was no issue joined, nor any judgment by default given, or inquiry awarded as to damages, whereupon the verdict of the jury in that suit finding for the plaintiff, and assessing his damages and costs, could or can be founded.

That judgment was rendered for the said Henry, when by law it ought to have been rendered for the said Samuel.

Plea *in nullo est erratum.*

By the Court. We have considered the exceptions taken to this record, and shall briefly state in the order of assignment, the reasons which lead us to conclude that this judgment ought not to be reversed.

1. The act of Assembly upon this subject, Iredell, 301,

does not require that the party obtaining an attachment shall swear *positively* to the amount of his debt or damage. It is sufficient if he swears to the best of his knowledge and belief; and the oath taken in the present case does not *substantially* differ from that required by the act. Had it varied from the effective meaning of the act, it must have been considered as no oath at all, and then the defendant might have availed himself of it by plea in abatement; and wherever an exception may be so taken, it cannot be assigned as error. The act has at once prescribed the form of proceeding, and directed the manner in which any omission shall be taken advantage of by the defendant. If, therefore, this be an error, it would be wrong to reverse a judgment, long since rendered, when the defendant might in the first instance have abated the writ.

2. We conceive that this irregular return is helped by the statutes of Jeoffail, 18 Eliz., ch. 14, and 4 and 5 Ann, ch. 16—the first of which provides that judgment shall not be stayed or arrested by reason of any imperfect or insufficient return of any sheriff or other officer, and by the latter act the same practice is extended to judgments by default.

3. This is altogether a collateral matter, no way essential to the gist of the action, nor in any respect connected with the regularity of the judgment. But it does not appear upon the face of the record, that the defendant in error was the sheriff of the county when this order was made; and presumption, if made at all, should be rather to support than destroy a judgment. The order itself is likewise mere surplusage—it is directory on the sheriff to do that which the law has already enjoined upon him; for it may be fairly interpreted, that he either keep the goods in his custody, or deliver them on being replevied. Let this exception, however, have its greatest weight, and we think it comes completely within the spirit and meaning of the statute of 16 and 17 Car. 2, ch. 8, and 4 and 5 Ann., ch. 16.

4. This should have been pleaded in abatement.

5. Admitting that this appeared on the record, which it does not, yet it is to be considered that the jurors are

appointed by the court, and the sheriff possesses no other power than merely as a minister to summon them to attend. —Even in England, where the mode of appointing juries is extremely different, this objection could only form a cause of challenge to the array, and if omitted to be so taken, could not be assigned for error. Challenges might have been also made upon the same ground, had the inquest been formed of talesmen; but to presume that they were so formed, would be to make an error where none appears.

6. The return is certainly informal, but is cured by the statutes before referred to.

7. If there be any weight in this objection, as applied to original attachments, we think that under the circumstances of this case, it cannot be taken advantage of in error.

Judgment for the defendant in error.

NOTE.—See *Powell* v. *Hampton*, ante, 86, and the cases there referred to in the note.

THE STATE v. THOMAS GAYNER.—Page 305.

If a prisoner challenge peremptorily more than thirty-five jurors on a capital trial, the challenge shall be disallowed.

The prisoner was indicted for horse-stealing in the Superior Court of Law for Halifax district, April term, 1801, and pleaded not guilty. On his trial he challenged thirty-five jurors, without shewing any cause, and they were rejected accordingly. When the next was drawn and called to the book to be sworn, he challenged him also, and claimed a right to challenge as many others as he thought proper, and to exclude them without shewing any legal cause. The question being argued, the court overruled the challenge; a jury was sworn, and the prisoner found guilty.—But the court, at the instance of his counsel, deferred passing judgment, and ordered the question to be transmitted to this Court.

The case was argued by the Attorney General for the State, and by *Haywood* for the defendant.

Hall, J. It is admitted that previous to the making of the statute 22 Hen. 8., ch. 14, any person arraigned for felony might have challenged as many as thirty-five jurors peremptorily. But in case such person peremptorily challenged above thirty-five, he was doomed to the *peine forte* and *dure*, by which means he avoided a trial by jury. But that statute directs that no person arraigned for felony can be admitted to make any more than twenty peremptory challenges. This statute was in force in this State until the passage of the act of 1777, by the 94th section of which it is enacted, that every person on trial for his life may make a peremptory challenge of thirty-five jurors. It has been contended, that inasmuch as the Legislature by that act put it in the power of a prisoner to challenge thirty-five jurors, the same number that he might have challenged peremptorily at common law, he also had a right to challenge peremptorily a greater number than thirty-five, by which means, as at common law, he would defeat a trial by jury. In other words, that the act of 1777 operated a repeal of the stat. 22 H. 8., ch. 14. I cannot subscribe to such a construction. I cannot but entertain a belief that the Legislature only intended to put it in the power of a prisoner peremptorily to challenge a greater number of jurors, than by the stat. 22 H. 8., ch. 14, he had a right to challenge; but that in addition to this privilege they intended him no other. If they had intended that a prisoner, by challenging thirty-six jurors, should defeat a trial by jury, they must have also intended, either that he should draw down upon himself the judgment of *peine forte* and *dure*, or that he should not be suitably punished, however grossly he might have offended. That the Legislature intended either cannot be admitted. I think the act of 1777 only intended that a prisoner might challenge thirty-six jurors, under the same rules and regulations that he might have challenged 20 under the stat. of 22 H. 8., ch. 14, before the passage of the act; if so, no prisoner since that statute has been admitted to chal-

lenge more than twenty jurors—if they did, such challenges have been overruled, and so I think they ought to be in case a prisoner, since the passing of our act, peremptorily attempts to challenge more than thirty-five jurors. One strong reason why, under the statute of H. 8., peremptory challenges to more than twenty was not allowed, was because the sentence of *peine forte* and *dure* could not be pronounced against the challenger, as not being authorized either by common law or the statute. Much less ought such challenges to be countenanced here, as our act of Assembly makes no provision of that sort; and if it did, such provision would be rendered ineffectual by our constitution. I am therefore of opinion in this case, that the prisoner had not a right to challenge peremptorily more than thirty-five jurors, and that as he did do so, it was proper to overrule it.

Johnston, J. By the common law, the prisoner was allowed to challenge thirty-five jurors, without assigning any cause; if he challenged more, without cause shown, he was treated in the same manner as if he had stood mute, and had sentence to suffer a most cruel death for his obstinacy and contempt of the court.

By the stat. 22, H. 8., ch. 14, the prisoner is restrained from challenging more than twenty peremptorily, and from that to this in England, and from the establishment of the government of this country under the charter of King Charles 2, till the session of Assembly in 1777, the practice has uniformly been, that if a prisoner, after making peremptory challenges to the number of twenty, and after made further challenge, without showing cause, such further challenge was disallowed and prevented, and the juror sworn. One reason given by Hale, in his history of the Pleas of the Crown, 2d, 270, why, if a prisoner challenge more than twenty peremptorily, such challenge shall be overruled, is, "because the stat. hath made no provision to attaint the felon, if he challenge above the number of twenty."

By the Declaration of Rights, sect. 9, "No freeman shall be convicted of any crime, but by the unanimous verdict of a jury of good and lawful men, *as heretofore used*." By

this regulation, the cruel manner of putting a prisoner to death at common law, where he stood mute or challenged peremptorily a greater number than was permitted by law, is altogether done away. Judgment of death could therefore be pronounced only in cases where the prisoner is found guilty on trial by jury, or where he on his arraignment confesses the charge by pleading guilty.

By the act passed November, 1777, sec. 94, the prisoner may make a peremptory challenge of thirty-five jurors; but makes no provision to attaint the felon if he challenge above that number, which brings it expressly within the reason above laid down in Hale. It however makes an alteration in the manner of the trial of prisoners from what was heretofore used, and not perfectly conformable to the rule laid down in the Constitution; but as it only extends that rule in favor of life, it has passed *sub silentio*, and never been questioned. Had it been objected to by the counsel for the State, there appears to me great doubt whether the privilege allowed by the act could be supported on constitutional principles. Had the act, instead of increasing the number of challenges, restrained them to a less number than twenty, no judge would have hesitated a moment to have allowed the prisoner to make his peremptory challenge to the number of twenty, notwithstanding the act. Or the act had directed that in case the prisoner should challenge more than thirty-five, he should suffer *peine forte et dure*, as at common law, there is no doubt but it would be equally disregarded.

Upon the whole, I am clearly of opinion, that the act of 1777 is only an extension of the number of challenges, which had been restrained by the 22d of H. 8, and that the manner of trying criminals *heretofore used* is in no other respect altered. That the Judge who, in this case, rejected the challenge, and ordered the jury to be sworn, was warranted in that judgment by legal and constitutional principles; and that the prisoner being found guilty, sentence of death should be pronounced against him.

Macay and Taylor, Judges, concurred in opinion with

the other two Judges, that the prisoner had no right to challenge more than thirty-five jurors, without showing legal cause.

ANNE JONES v. WILLIAM JONES, et al. Ex'rs, &c.—Page 310.

The children of a female slave who is specifically bequeathed, if born after execution of the will and before the death of the testator, go to the residuary legatee.

On the 9th day of April, 1787, Margaret Jones made her last will and testament, in which were the following bequests, to-wit: "I give and bequeath to my beloved son, William Jones, one negro, named Tena. Should my son William die without an heir, in that case all the property herein bequeathed to fall to his sisters, if living.

"I give and bequeath to my beloved daughter, Ann Jones, one negro boy named Harry, and all the remainder of my property, with Dick."

After the execution of the said will, and before the death of the testatrix, the woman Tena (bequeathed to the said William Jones) had two children, to wit, Moll and Jude. The testatrix died in the year 1791, without altering or revoking her said will. Thereupon the defendants caused the same to be duly proved, qualified as executors thereof, and took into their possession the said Moll and Jude.

Ann Jones, the plaintiff, filed her petition against the defendants, and claims the said Moll and Jude, as part of the residuary property of the testatrix, which had not been before specifically given away.

And the question is, whether Ann Jones is entitled to the negroes Moll and Jude, by virtue of that clause of the will which gives her the remainder of the testatrix's property. Or is William Jones entitled to the same, by reason of the bequest of the negro woman Tena, the mother of Moll and Jude?

By the Court. As the will did not begin to operate until the death of the testatrix, no right to Tena vested in William Jones till that time; she remained the property of the testatrix, who was entitled to all the profits arising from her; consequently her children, the negroes in question, were the property of the testatrix at her death; and as they were not specifically bequeathed by her, form part of the residuum of her estate, and are included in the bequest to Ann, the plaintiff, of the remainder of the testatrix's property.

Judgment for plaintiff.

NOTE.—See *Pearson* v. *Taylor*, 4 Dev. & Bat. Rep., 60; *Hurdle* v. *Elliott*, 1 Iredell's Rep., 174; *Cole* v. *Cole*, Ibid., 460; *Covington* v. *McEntire*, 2 Iredell's Eq. Rep., 316.

WILLIAM DRY'S EX'RS v. JAMES ROPER'S EX'RS.—Page 311.

A forbearance to sue for more than seven years after the death of a testator and qualification by his executors, will bar the claim under the act of 1715, notwithstanding the act of 1789—(See 1 Rev. Stat., ch. 65, sec. 11 & 12.)

This was an action of debt brought in the Superior Court of Law for the district of Fayetteville, and came before the court on the following statement made by the counsel for the parties, viz:—"On the 26th May, 1797, the executors of William Dry brought this suit, on a bond with a penalty, conditioned for the payment of £100 procl. money, on the 1st of October, 1775, of which £24 were paid by Roper in December, 1774, and that no other payments have been since made. It is admitted that Roper duly executed the bond, and that he departed this life some time in the year 1782, and also that his executors qualified in the same year.

The defendants pleaded *solvit ad diem & solvit post diem*, relying on the presumption created by the lapse of twenty years. They have also pleaded the act of the General Assembly, passed in 1715, concerning proving wills and

granting letters of administration. And whether by either of these pleas the plaintiff is barred of a recovery, is submitted to the opinion of the court.

Edward Jones, plaintiff's attorney.
Francis Locke, defendant's attorney.

By the Court. We are of opinion that the plaintiff is barred by the act of 1715, referred to, more than seven years having elapsed from the death of the debtor before this suit was brought.

Judgment for defendant.

It is proper to be remarked by the reporters, that in the case of Ogden, administrator, &c., Blackledge, executor, &c., which went to the Supreme Court of the United States, from the Circuit Court of North Carolina, it was determined that the act of 1715 was repealed by an act passed in 1789, and therefore no bar to a recovery in a case such as the foregoing. It is much to be regrettted that, on such an important question, such different decisions have been made and that the right of recovery in such a case should depend on the mere circumstance of the plaintiff being entitled or not to sue in the Court of the United States.

NOTE.—See *Young, Miller & Co.* v. *Farrell*, 2 Hay. Rep., 219, and the note thereto

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JAMES BRYANT v. JAMES MILNER.—Page 313.

An award which merely directs a sum of money to be paid, but without stating the matter of controversy, or directing a release or saying that the payment shall be in satisfaction of any specified injury or demand, may be rendered sufficiently certain, final and mutual by averments connecting the award with the submission.

The plaintiff brought an action of debt in the County

Court of Person, upon an award, and declared in the following manner, to-wit:

James Bryant complains of James Milner, in custody, &c., of a plea that he render unto him sixty dollars, of the value of thirty pounds, which to him he owes and from him detains: For that whereas a certain controversy had arisen and existed, between the said James Bryant and the said James Milner, of and concerning a horse which the said Bryant had lent to the said Milner, and the said Milner had not returned to the said Bryant; that they the said Bryant and Milner being willing to settle and determine the said controversy in an amicable and friendly manner, on the seventh day of September, in the year one thousand seven hundred and ninety-nine, in the county of Person aforesaid, submitted the said controversy to the arbitrament and award of James Cochran, David Mitchell, Drury Jones, William Mitchell and Wilson Jones, arbitrators mutually chosen and agreed upon, by the said Bryant and Milner; and they the said James Cochran, David Mitchell, Drury Jones, William Mitchell and Wilson Jones, being so chosen and appointed arbitrators as aforesaid, then and there undertook to hear and determine the matter of controversy aforesaid so existing between the said Bryant and Milner; and having heard the allegations and evidence of the said parties, of and touching the said matter of controversy, they the said James Cochran, David Mitchell, Drury Jones, William Mitchell and Wilson Jones, arbitrators as aforesaid, then and there did arbitrate, settle and determine the said matter of controversy, and then and there rendered, under their hands and seals, their award of and upon the same matter of controversy in the words and figures following, to-wit: "We, the subscribers, having been chosen to arbitrate a certain matter of controversy between James Milner, of the one part, and James Bryant, of the other part, do award, that the said Milner shall pay unto the said Bryant sixty dollars, or secure the same to be paid, on or before Christmas next, by giving his bond with security. Given under our hands and seals this seventh day of Sep-

tember, 1799;" whereof the said Milner then and there had notice. By force of which award the said James Milner became indebted to, and liable to pay the said James Bryant, the aforesaid sum of sixty dollars, or secure the same to be paid, on or before Christmas then next following the date of the said award: And the said James Bryant saith that the aforesaid sum of sixty dollars is of the value of thirty pounds current money of this State." Yet the said James Milner, &c." The defendant pleaded the general issue, no submission, and that the arbitrators proceeded ex parte and partially; on which issues were joined.

The plaintiff having appealed from a judgment against him in the County Court, the cause was tried in the Superior Court for Hillsborough district, at April Term, 1801, when the Jury found a verdict for the plaintiff, but subject to the opinion of the court on this question, "Whether the award as declared on, was sufficient to enable the plaintiff to recover." And thereupon the cause was transmitted to this Court.

Norwood, for the plaintiff. Courts anciently considered awards as judgments, and construed them strictly, without attending at all to the intention of the arbitrators, unless expressly stated in the award. Kid on Awards, 154. Brownl., 92. Yelv., 98. This rule of construction produced great mischief and rendered injurious that method of settling controversies, which would otherwise have been of great utility to the community. The Judges, therefore, in the latter end of the reign of James I departed from this rule, and adopted one more liberal and more conducive to justice, holding that awards should be interpreted liberally, as contracts, according to the intention of the parties, and of the arbitrators. Kyd on Aw., 155, 156. Awards ought to be liberally construed, because made by Judges on the parties own choosing. 1 Bur., 277. Under this rule, awards made on parol submissions ought to be interpreted as verbal agreements. An award, though under seal, is not a specialty; and if made on a parol submission, is of the same nature with the submission, and ought to be construed by the same

rules. 1 Bur., 279, 281. In an action of debt upon an award, made under a parol submission, the plaintiff may by averment connect the award with the submission, and thereby cure a defect, which otherwise would have been fatal. 1 Bur., 274, 278, 279. Allen, 51, 52. 1 Wils., 58. If an award recites the controversy, and orders a sum of money to be paid, it shall be intended in satisfaction of that controversy, and the award held good. Kid on Aw., 152, 153, 150, 148, 149. Com. Rep., 328. If the award is not made on the submission, or there is any other objection to the award, the defendant must shew it by plea; for the Court will not presume anything which will destroy the award, but will presume that no such circumstance did exist. Wilson, 163. 2 Mod., 227. 1 Bur., 277. 2 Cro., 663. In debt on an award, the plaintiff need not shew anything more than the submission; that the arbitrators acted; that they made an award on the matters submitted; the amount of the award; that the defendant had notice of the award; and a breach by the defendant. Kid., 198; 1 Bur., 881; 1 Salk., 72. When an award is annexed to the submission by proper averment, either in a declaration or plea, all the material facts are put upon the record, in as full and conclusive a manner as if the matter submitted had been mentioned in the award. Com. Rep., 330.

In this case, the declaration states a submission by the parties of a controversy relative to a horse; that the arbitrators acted under that submission, and made an award of the controversy so submitted; that the defendant had notice of the award; and assigns a breach. I therefore contend that judgment ought to be given for the plaintiff.

But suppose I should admit that no authority has been cited which comes up to the case, the plaintiff would, on principle, be entitled to judgment. For the books referred to incontestibly prove, that the Judges in England, having observed the inconvenience and injustice of the ancient rules governing the construction of awards, have from time to time so changed and amended those rules, as to render

them more conducive to justice and the good of the community. The entire change of the rule in the time of James the first, and many decisions made since that time in support of awards, evidence the authority of the court in such cases, and hold forth an example worthy of imitation, when good policy and justice require an extension of the present rule. In this case the only objection to the award is, that the controversy submitted and settled, is not identified by the award itself; and it will be contended the award cannot be supported by an averment of that fact. I cannot see what inconvenience or injustice would result from permitting such an averment, particularly in support of awards made on parol submissions; because it might be done in a plea as well as in a declaration, and therefore mutually beneficial to the parties; and the judgment in such cases would be conclusive, and might be pleaded in a subsequent suit on the original cause of action. In many other cases, it is not only permitted, but is absolutely necessary to support the principal matter of declarations and pleas by proper averments. Thus, in pleading a former judgment, the defendant must aver that it was given on the same cause of action; and in pleading a release of all demands, the defendant must aver the demand on which he is sued existed before the execution of the release; these two cases appear to be much stronger than the one before the court. In one instance a record, and in the other a deed is supported, and made to apply in a particular manner, by the averment of a fact not appearing on the face of them; the present case is a parol transaction, and therefore certainly more open to averments. It is a good policy to render as easy and certain as possible this amicable and cheap method of settling disputes.

Haywood, for defendant.

The award is not certain or final; no particular controversy is recited; no release is awarded; nor is the money directed to be paid in satisfaction of any specified injury or demand. It is not mutual, because it does not discharge any cause of action, and as it cannot be supported by aver-

ment, leaves the defendant exposed to a suit on the original controversy. 1 Bur., 274; 2 Stra., 1024; 2 Bur., 701; 1 Salkeld, 69.

By the Court. We are of opinion that the award is sufficiently certain to be understood that the money awarded was in satisfaction for the horse, which was the only matter of controversy mentioned in the submission, and that on a recovery in this action, the plaintiff will be barred from maintaining any other action respecting the subject submitted. Therefore that the award is sufficient, and that judgment should be entered for the plaintiff.

NOTE—See *Borretts* v *Patterson*, Taylor's Rep., 37, and the cases referred to in the note.

JOHN NESBIT v. DAVID NESBIT, et al., Ex'rs.—Page 318.

An assignee by estoppel merely, where no interest passed by the assignment, cannot maintain an action of covenant.

The plaintiff brought an action of covenant in the Superior Court for Salisbury district, and declared thus: "David Nesbit and John Brown, executors of the last will and testament of Hugh Montgomery, deceased, were summoned to answer John Nesbit of a plea of covenants broken, &c. Whereupon the said John Nesbit, by his attorney Alfred Moore, complains, that whereas Andrew Craustin, by deeds of lease and release, bearing date respectively the third and fourth days of February in the year of our Lord one thousand seven hundred and fifty-eight, for and in consideration of ten pounds proclamation money, to him in hand paid by Hugh Montgomery, merchant and ordinary keeper in Salisbury, for and on behalf of Mary Montgomery (now wife of Anthony Newnan) daughter of said Hugh, did con-

vey and make over the fee simple estate of and in one messuage and lot of land, situate, lying and being in the town of Salisbury, in the county of Rowan, known and described in the plan of the said town by the number one (No. 1) in the southwest square of the said town, and containing by estimation twelve square poles, unto the said Mary Montgomery (now Newnan): And whereas afterwards, to-wit, on the 23d day of April, in the year of our Lord, 1762, at Rowan county, in the said district, the said Hugh Montgomery and Mary his wife, by a deed poll then and there executed, purporting to be made by the said Hugh and his wife, for and on behalf, and for the use of their said daughter Mary Montgomery, (now Mary Newnan,) sealed with the seals of them the said Hugh Montgomery and Mary his wife (which said deed poll the said John Nesbit now brings here into court) for and in consideration of the sum of sixty pounds, proclamation money, to them paid by William M'Connel, merchant, for the use of their said daughter Mary, did bargain and sell to the said William M'Connel, the messuage and lot of land aforesaid, to have and to hold the same to him the said William M'Connel, his heirs and assigns forever, with the buildings and improvements thereon, and did in and by the said deed poll by them duly executed as aforesaid, covenant, promise and agree to and with the said William M'Connel, his heirs, executors, administrators and assigns, that he the said William M'Connel, his heirs and assigns, should forever thereafter peaceably and quietly have, hold, use, occupy, possess and enjoy the same messuage and lot of land and premises, without any let, suit, trouble, denial or interruption of her the said Mary Montgomery (now Newnan) their said daughter, or any other person or persons whatsoever, lawfully claiming or to claim by, from or under him the said Hugh and Mary his wife, or their said daughter Mary (quitrents only excepted). And the said Hugh and Mary his wife did therein also further covenant, promise and agree to and with the said William M'Connel, that in case the said Mary, the daughter, her heirs or assigns, should at any time thereafter enter into the said bargained premises, so as to dispossess the

said William M'Connel, his heirs or assigns, or break, determine, nullify or make void the said sale to him William, that then the said Hugh and Mary his wife, and their heirs, or either of them, shall return and pay back to him William double the purchase money aforesaid paid by said William, with interest, and pay also for all damages unto the said William M'Connel, his heirs or assigns, whatsoever they may suffer thereby.

"And the said Hugh and Mary his wife did therein also further covenant, promise and agree, for themselves, their heirs, executors and administrators, to and with the said William M'Connel, his heirs and assigns, that he the said Hugh, or the said Mary his daughter, when she should arrive at age, (which would happen in the year 1773) should and would, at and upon the request, and at the cost and charges in the law of him the said William M'Connel, his heirs or assigns, make, do and execute, or cause and procure to be made, done and executed, all and every such act or acts, conveyance or assurances in the law whatsoever, for the better and more perfect conveying and assuring of the said messuage or lot of land and premises unto the said William M'Connel, his heirs and assigns forever, as by the said William M'Connel, his heirs or assigns, or by his or their counsel learned in the law should be reasonably devised, advised or required. By virtue of which sale to the said M'Connel, he entered on the said bargained premises, and was thereof duly seized according to the legal operation and effect of the said deed poll: And being so seized, afterwards, to-wit, on the first day of August, in the year of our Lord, 1768, in the county and district aforesaid, by a certain indenture then and there executed, between the said William M'Connel and Jane his wife, of the one part, and the said John Nesbit of the other part (which indenture, sealed with the seals of the said William and Jane his wife, the said John Nesbit now brings into court, the date whereof is the same day and year last aforesaid) which indenture hath also been duly proved and registered in due form of law, the said William and Jane his wife, for and in consideration of the sum of forty-

five pounds proclamation money, to them in hand paid by the said John Nesbit, granted, bargained and sold unto the said John Nesbit, his heirs and assigns, the one-half part of the said lot number one (No. 1) purchased by him William as aforesaid, that is to say, the half part thereof lying to the south, and containing six poles in length, fronting the main street, and running twelve poles back, with the advantages, hereditaments and appurtenances to the same half lot belonging, and all the estate, right, title, interest, claim and demand of them the said William M'Connel and Jane his wife, of, in and to the same half lot of land and premises, and every part thereof, to have and to hold the same to him the said John Nesbit, his heirs and assigns forever, to his and their own proper use and behoof. And the said William and Jane did then and there, in and by the said indenture, covenant and agree to and with the said John Nesbit, that they the said William and Jane, the premises and every part thereof, so by them sold to the said John Nesbit, would warrant and forever defend against them the said William and Jane, and their heirs; by virtue whereof the said John Nesbit entered into the said half lot of land to him so sold as aforesaid, and was thereof seized according to the operation and effect of the said indenture.

"Nevertheless, a certain Anthony Newnan, who intermarried with the said Mary, daughter of the said Hugh and Mary Montgomery, having notice of the premises, afterwards, to-wit, on the.....day of.....in the year of our Lord one thousand seven hundred and.....claiming title to the same half lot (sold to the said John as aforesaid) in right of his second wife Mary, daughter of said Hugh, did interrupt the said John in his enjoyment and possession of the same, and did set up the title of the said Mary his wife, and by force and virtue of the same, did enter on the said half lot, and turn said John out of possession and the enjoyment of the same half lot, and hath ever since, under and by virtue of his said wife Mary's title aforesaid, held the same. And the said John also saith, that on the .....day of.....in the year.....in the county and district

aforesaid, he requested the said Anthony Newnan and Mary his wife, daughter of said Hugh as aforesaid (she the said Mary being then of age, that is to say, of the age of twenty-one years and upwards, to execute an indenture of bargain and sale, so as to convey to the said John, at the proper costs and charges of the said John, the said half lot in fee, agreeably to the tenor and effect of the said covenant made by the said Hugh and Mary his wife, with the said William M'Connel as aforesaid; but the said Anthony and Mary his wife then and there refused to execute the same, or in any wise to convey the title of her Mary, the daughter to said John, of which the said executors of the said Hugh afterwards, to-wit, on the.....day of..... in the year.....at the county and district aforesaid, had due notice, but have not procured the said Anthony and Mary his said wife, to perform the covenant aforesaid of the said Hugh, which on the part of the said Mary the daughter, and those claiming by, from, or under her, was to be performed; nor have the said executors made the said John any satisfaction on account thereof; wherefore the said John saith, that he the said Hugh, in his lifetime, and his said executors since his death, have not kept the covenant aforesaid made by the said Hugh, and thereby said John hath sustained damage to the value of ....and therefore, &c."

The jury having found a verdict for the plaintiff, and assessed his damages, the defendants moved in arrest of judgment, and assigned the following reasons: 1. That the covenant made by the testator, is not such an one as can be assigned, so as to enable the assignee to sue in his own name. 2. That it is a covenant in gross; therefore the assignee can take no advantage thereof.

By the Court. The question whether this action is maintainable by the assignee, under all the circumstances of the case, may receive some illustration by a statement of the substantial parts of the second and third resolutions in Spencer's case. By the second, it appears, that if a man covenants for himself and his assigns, yet if the thing to be

done, be merely collateral to the land, and dees not concern the thing demised in any sort, the assignee shall not be charged. The instances stated are, where a lessee covenants for himself and his assigns, to build a house upon the land of the lessor, which is not parcel of the demise, or to pay any collateral sum of money to the lessor; as an action would not lie in any of these cases against the assignee of the lessee, it follows for the same reason, that no action would be maintainable by the assignee of the reversion against the lessee. The reason is satisfactorily explained by the examples stated in the third resolution. The first of these is a lease of a stock of cattle or goods, with a covenant to deliver them or the value at the end of the term. This does not bind the assignee, because it is a thing merely in action in the personalty, and is destitute of the privity which subsists between the lessor and lessee of lands in respect of the reversion. The next instance is of a lease of house and lands, with a stock of cattle or sum of money rendering rent, with a covenant by the lessee, that he or his assigns shall re-deliver the money or cattle at the end of the term: Neither is the assignee bound in this case, although the rent might have been increased in respect of the money and cattle; because, the covenant is personal and binds only the covenanter, his executors and administrators.

From the whole of this case, it may be laid down as a rule without any exception, that a covenant to run with the land, and bind the assignee, must respect the thing granted or demised, and that the act covenanted to be done or omitted, must concern the lands or estate conveyed. But when it appears on the face of this declaration, that the defendant's testator who sold the lot, neither had, nor pretended to have, any title to it; that on the contrary, Mary, his daughter, had the complete seizin under the deed from Cranston; that the testator having conveyed notitle to M'Connel, the plaintiff could consequently derive none from him, it may be asked, what is there to create any privity between these parties, either of estate or contract? The maxim, *transit terra, cum onere*, presupposes a transfer of the land, and when that

actually takes place, it forms the medium of a privity between the assignees. Unless, therefore, a presumption is made against the unequivocal statement in the declaration, the title of this lot never ceased to be in the daughter, from the time Cranston conveyed to her. Suppose the father and mother had entered into the covenants contained in the deed, by a separate instrument, unaccompanied with any conveyance of the land, no one could argue that an assignee might enforce in a court of law, the benefit of such a contract. Can the case, then, be materially altered, by annexing these covenants to a deed of bargain and sale, which as a conveyance under the statute of uses, transfers only what the bargainer might rightfully convey? For the declaration shews that rightfully he could convey nothing. If one man covenants that another shall quietly enjoy or obtain a conveyance for an estate which is owned by a third, this binds the covenanter and his executors or administrators to the covenantee, but cannot extend to the assignees of the latter. Nor can I conceive that the law is different, where a man sells an estate and makes the same covenants, provided it appears upon the declaration that he had no right. Both cases are equally devoid of that privity which can alone form the basis of reciprocal remedies to the parties.

So far the case has been briefly considered, as influenced by the general principles laid down in Spencer's case. Some other authorities approach more directly to the question upon the record. The case of *Webb* v. *Russell*, 3 Term Rep., 393, explicitly shews, that there must be a privity of estate between the covenanting parties; and therefore if a mortgagor and mortgagee of a term, make a lease, in which the covenants for the rents and repairs are with the mortgagor and his assigns, the assignee of the mortgagee cannot maintain an action for the breach of the covenants, because they are collateral to his assignor's interest in the land, and therefore do not run with it. The mortgagor having no more than an equitable title could transfer no privity; but yet he himself might sue upon the covenants, as was done in this very case, 1 H, Bl., 562. In that case, the claim, though perfectly consonant

with natural equity, and even so strong on the merits as to inspire the court with a wish that they might see a ground whereon to decide in the plaintiff's favor, was nevertheless compelled to yield to the rules and policy of the law. It therefore furnishes an answer to all the arguments which might be drawn from the justice and convenience of supporting the present action; since it is of primary importance to preserve in an uniform and steady direction, the principles of law which govern estates and contracts, that a knowledge of the consequences may assist men in regulating their transactions. And upon this occasion, it may not be improper to use the language of a diligent and learned author: "Arguments from inconvenience certainly deserve the greatest attention, and where the weight of other reasoning is nearly in equipoise, ought to turn the scale. But if the rule of law is clear and explicit, it is vain to insist upon inconvenience; nor can it be true that nothing which is inconvenient is lawful, for that supposes, in those who make laws, a perfection which the most exalted human wisdom is incapable of attaining, and would be an invincible argument against ever changing the law." Harg. Coke Litt.

The case next to be examined, is that of *Noke* v. *Awder*, Cro. Eliz., 373, 476, which I will succinctly state. The plaintiff declared that John King let the lands to the defendant for a term of years, who granted them by indenture to one Abel, with a covenant that Abel and his assigns should peaceably enjoy, without interruption of any person, and that Abel assigned to the plaintiff. The declaration then states, that long before John King had anything in the lands, one Robert King was seized in fee, and died seized, whereupon the land descended to Thomas King, who entered upon the plaintiff, and ousted him. After a verdict for the plaintiff, the exception taken in arrest of judgment was, that the plaintiff not having shewn that John King had anything when he made the lease to the defendant, and the defendant having granted to Abel by indenture, nothing passed thereby, but by estoppel; then when Abel assigned to the

plaintiff, nothing passed, for a lessee by estoppel cannot assign anything over; consequently, the plaintiff was not such an assignee as could maintain an action of covenant against the defendant, and the court were of opinion that covenant will not lie upon an assignment of an estate by estoppel.

This case may, we think, be considered as good law, because it is in exact conformity with the principles before stated, which governed the decision in *Webb* v. *Russell*, and because it is noticed by late and respectable writers. Its authority, however, has been supposed to be weakened by what fell from the court in *Palmer* v. *Ekins*, 2 Ld. Ray, 1551, but a slight examination will serve to evince, that this idea is founded in mistake, and instead of being thus shaken, it is in truth confirmed and established. The case was this: The plaintiff Palmer, in an action of covenant against Elizabeth Ekins, for non-payment of rent, declared that John Palmer was seized in fee, and being so seized, by indenture demised to the defendant, a messuage for twelve years, rendering rent to the lessor and his assigns, by virtue of which, the defendant entered, and that afterwards John Palmer, by lease and release, conveyed the reversion to the plaintiff.—The breach is then assigned in the non-payment of the rent: The defendant pleaded a special *nil habuit in tenementis*, which was overruled upon demurrer, upon the ground that it appeared upon the face of the declaration, that the lease was made to the defendant by indenture, which estopped him from such a plea; and further, that an assignee might take advantage of an estoppel, because he was privy in estate.

Between the two cases there is this striking difference, which presents itself at once—that in the latter, the declaration discloses a good title in John Palmer when he leased to the defendant, and a clear reversionary interest, when he assigned to the plaintiff, who was therefore not merely a claimant by estoppel, but (if we may so expresss it) an assignee in *pleno jure*. Whereas in *Noke* v. *Awder*, the declaration shews, that when John King made the lease to

the defendant he had no estate, and consequently that the defendant's lease to Abel was only by estoppel, who could assign no interest to the plaintiff. But in *Palmer* v. *Ekins*, as the plaintiff received the estate by assignment, a privity was thus created, and he might take advantage of the estoppel, which appeared upon the declaration.

It is evident, then, that this case does not, either expressly or by implication, warrant the inference that an assignee by estoppel may maintain covenant: The proposition which it does warrant is essentially different, viz., that an assignee (by which is meant an assignee with an interest) may take advantage of an estoppel appearing upon the face of the declaration. From the whole of the case it may be fairly collected, that the judgment would have been rendered against the plaintiff, had it appeared upon the declaration, that he was no more than an assignee by estoppel.

It is scarcely necessary to make any remarks upon the cases cited to shew that parties or privies in estate or interest are bound by estoppel. The position is admitted, but it can only be correctly applied to those cases where the privity appears upon the face of the proceedings, certainly not to those where the want of privity is manifest. Then admitting that Montgomery's deed (which is a deed poll) would, if nothing more appeared upon the declaration, but that the assignment and the breach estop him from denying his title, which is nearly the case in 2 Ld. Ray. Yet under the circumstances which do exist in the case, there are two rules which must be taken into the account, one is that a stranger shall neither be bound by, nor take advantage of an estoppel; the other is, that where the truth is apparent upon the same record, there the adverse party shall not be estopped to take advantage of it; for he cannot be estopped to allege the truth, when it appears of record. Coke. Litt., 353 *b*.

The remarks we have made lead us to this conclusion: That the plaintiff, placed in the best possible light, is no more than an assignee by estoppel; that there is a total absence of that privity between him and the defendant, which could alone form the chain of legal communication; that

the covenants made by Montgomery were collateral to the title; and because these things distinctly appear upon the declaration, we are of opinion that the judgment should be arrested.

DECEMBER TERM, 1801.

ISAAC STANDLEY v. RICHARD HODGES.—Page 330.

The witnesses of the prevailing party, could not, after the act of 1783 (see New Rev., ch. 189., sec. 3,) warrant for their attendance after judgment in the suit.

This cause came from Newbern Superior Court on the following case: The defendant and one Abraham Bush had a suit depending in the Superior Court of Law for the district of Newbern, in which the present defendant was plaintiff, and which was determined in the term of March, 1795. The defendant Hodges prevailed in that suit: The plaintiff Standley was summoned and attended as a witness for Hodges, and took out tickets for his attendance, but did not file them with the clerk. The present plaintiff, Standley, after the determination of the suit between Hodges and Bush, warranted the present defendant Hodges for his attendance, and the cause was removed by certriorari to this court. The plaintiff was proceeding on the trial to give evidence to support his cause at common law, as for work and labor done, but was stopped and nonsuited by the court, with leave to save the following question for the opinion of the Judges, viz:

Whether, prior to the act of Assembly passed in the year 1796, ch. 12, a witness had a right to charge the party at whose instance he had been summoned and attended, for such attendance, as at common law, for work and labor done; or must for his remedy resort to the party cast, in the manner prescribed by the act of Assembly passed in 1783, ch. 12?

By the Court. We are of opinion that the nonsuit was properly directed, and ought to stand—the plaintiff not having adopted that mode of recovery sanctioned by law.

NOTE.—See *Moore* v. *Islar*, 1 Martin's Rep., 78, and the cases referred to in the note.

THE STATE v. BUTLER.—Page 331.

An indictment for forcible entry and detainer upon the English statute of 21st of James 1st (See 1 Rev. Stat., ch. 49, sec. 6) must specify the kind of term from which the party is expelled, to authorize a writ of restitution; and the term must be unexpired at the time of the trial.

This was an indictment brought in Hillsboro' Superior Court for forcible entry and detainer, as follows:

"The jurors for the State upon their oaths present, that Isham Parham, late of the county of Granville, in the district of Hillsborough aforesaid, on the fifteenth day of January, in the year of our Lord one thousand seven hundred and ninety-nine, was possessed of a certain messuage with the appurtenances, situate and being in the county of Granville, in the district aforesaid, for a certain term then unexpired, and being so possessed thereof, one John Butler, late of the county of Granville, in the district aforesaid, labourer, afterwards, viz, on the fifteen day of January, in the year aforesaid, into the said messuage with the appurtenances aforesaid, the freehold of one Isaac Hunter, in the county of Granville, in the district aforesaid, with force and arms and with strong hand, unlawfully did enter and the said Isham Parham from the peaceable possession of the said messuage with the appurtenances aforesaid, then and there, with force and arms and with strong hand, unlawfully did expel and put out the said Isham Parham from the possession thereof so as aforesaid, with force and arms and with strong hand, being unlawfully expelled and put out,

the said John Butler him the said Isham Parham, from the aforesaid fifteenth day of January, in the year aforesaid until the day of the taking of this inquisition, from the possession of the said messuage with the appurtenances aforesaid, with force and arms and with strong hand, unlawfully and injuriously, then and there, did keep out, and still doth keep out, to the great damage, &c."

Being found guilty by the jury, in Hillsboro' Superior Court, a motion was made by the Solicitor General, that a writ of restitution should be awarded; upon which the cause was sent up to this court to obtain a decision on that point.

The question was here argued by *Norwood* for the defendant, and *Haywood* for the State.

Norwood. Some rules are laid down in the books, directory of the manner of drawing indictments of forcible entry, which appear not to have been strictly attended to in the present instance. The exceptions arising on the face of the indictment, together with others of a more general kind, I mean to urge as reasons why the writ prayed for should not be awarded.

I. It is a rule, that the tenement in which the force is charged to have been committed, must be described with certainty, in order that the defendant may be apprised of the manner in which to make his defense, and that the sheriff may know exactly the possession to which the party praying the writ is to be restored. The words of the indictment are, "that Parham was possessed of a certain messuage with the appurtenances, situate and being in the county of Granville aforesaid, in the district aforesaid." This description is liable to the objection of vagueness and uncertainty, as much so as many of those instances which the books furnish, as having been held fatal to indictment. 1 Hawk., Pl. b. 1, c. 64, s. 37, where the cases are collected, and 4 Com. Dig., 210, D. 3.

II. The estate which the party expelled had in the land, ought to be shewn in a particular manner, to entitle him to the benefit of this writ, under any one of the statutes. The indictment states, that Parham "was possessed of a

certain term then unexpired." But it ought specially to have defined the term, whether for life or years, that it might appear to the court that the term is still unexpired. If the indictment had been on the 8 Hen. 6, it must have shewn that the party put out of possession was seized of a freehold, otherwise he could not be entitled to restitution under that statute. If the indictment be founded on the 21 s., 1 Car., XV, it ought to shew that he was possessed of a certain term for years; for neither tenant for life, nor tenant at will, are entitled to restitution under that statute. 1 Haw., Pl. B. 1, c. 64, s. 38; 4 Com., 210; 1 Salk., 260; 1 Ventris, 306.

III. A writ of restitution cannot properly be issued to the party expelled, unless it appears to the court that his right to the possession continued at the time the indictment was found. Here it is stated that he was possessed of a term unexpired on the fifteenth of January, 1799, the time of the expulsion; but it cannot be inferred that the term remained unexpired when the bill was found. On the contrary, it appears by a copy of the lease filed by the prosecutor, that the term ended the third of March, 1799; whereas the indictment was found at April Term, 1800. A writ of restitution cannot, then, be awarded to Parham —for he has no right to the possession. Can it be awarded to Hunter? I apprehend not. I. Because the indictment does not shew that Hunter was in actual possession: II. Because it does not appear that Parham held under Hunter. It is true, the indictment calls it the freehold of Hunter, which it might be, and yet Parham be a disseizor. It should have been clearly stated, that Parham held under a lease from Hunter.

IV. The Superior Courts cannot entertain jurisdiction upon all, or any of the statutes, relating to forcible entries. There is no act of Assembly conferring that jurisdiction in express terms, nor can any other authority be shewn for it. Besides, the writ of restitution, as used in England, is not given by the common law, but by the several statutes enacted for the purpose. Those statutes ought to be strictly pursued, and there is not one of them that will warrant issuing the writ upon this indictment. And as the

writ is not at common law, it cannot be issued on this record. 1 Plow., 206–7.

V. By the constitution of this State, no man can be deprived of his rights or property, but by the verdict of a jury, or his own admission or consent. Upon this indictment, neither the right of property nor of possession were put in issue; the force only has been decided upon: The defendant ought not, therefore, to be molested in his property or possession.

Upon these reasons, it is apprehended that the motion will not be granted.

Haywood. It is admitted, that certainty and precision are requisite in the statement of a criminal charge, and particularly in a case of this kind, where restitution is sought, but it would have been difficult, if not impossible, to have drawn this indictment so as to have effected those objects more completely. It certainly is not necessary to be more particular in a case of this kind, than in a declaration of ejectment; in both, restitution is to be made, and the property detained should be so specified, that the sheriff may, without difficulty, execute his writ. Yet this description would have been sufficient in an ejectment, and even less certainty than this indictment contains. 1 Term, 11. It would be sufficient in an indictment, or a plea in bar. Cowp., 683; 1 Term, 65; Doug., 154.

Nor was it necessary to have been more particular in stating the quantity of estate the defendant had in the land. *Term* is certain enough; it signifies, in legal acceptation, a term for years. An estate for years is frequently called a term, *terminus.* 2 Bl. Com., 143; Cok. Lit., 45, *b;* and the indictment must be understood, that at the time it speaks, the term was then unexpired, for it states that the defendant "still doth keep him out of possession." It follows that the defendant appears upon the face of the indictment to be a tenant for years whose term is unexpired; and such a one is entitled to restitution by the 21 Jac., c. 15. This is not an indictment upon the 8 Hen. 6, and therefore no seizin is necessary; it is upon the first mentioned statute,

and the defendant being within the benefit of that, it is not his term travel out of the indictment to ascertain whether his term still continues. As to jurisdiction, I take it to be a settled rule, that the Superior Courts have a general jurisdiction upon all criminal matters, whether arising at common law or by statute, unless taken away by express negative words. 2 Haw., b. 2, c. 3, s. 6. The act establishing these courts, invests them with a general criminal jurisdiction, Iredell 297, though partial limitations have been since made. The jurisdiction in this case, therefore, cannot be ousted, unless it be done by a law for that purpose; but none such exists

Lastly. If the constitutional objection be valid, then all the statutes relative to forcible entries are, at once, repealed; yet they have been used ever since the revolution, and generally considered to be part of the law. Iredell, 353. But the proceeding in those cases doth not affect the right of property or possession: If the defendant hath either, he may resort to the legal mode of establishing his claim, to that mode directed by the bill of rights, s. 1, 12, 14. It is such conduct as the defendant's that has a tendency to violate the instrument referred to; for he is endeavoring to establish a possession not sanctioned by law, and without resorting to the trial by jury.

Hall, J. It is agreed by the counsel in this case, that the only question now to be decided is, whether a writ of restitution ought to issue or not. It appears that the lease, under which Parham claims the land, has expired: He therefore cannot be put in possession by this writ, and no other person can have the benefit of it. For this reason, therefore, I think it ought not to issue.

Taylor, J. Various objections have been made to the awarding of a writ of restitution in the present case; they relate either to the power and jurisdiction of the court, or to the legality and fitness of exercising such a power, under the several exceptionable aspects in which this case has been presented.

The legitimate authority of the Superior Courts is to be sought for in the act by which they are established, in the

declaration of rights and the constitution, in the theory and frame of our Government, and in the result of a legal and regulated analogy to the courts of a similar construction, in the country whence our municipal law is derived. By the act of 1777, the Superior Courts are invested with cognizance of all pleas of the State, and criminal matters, of what nature, degree or denomination soever; whether brought before them, by original or mesne process, or by *certiorari*, writ of error, appeal from any inferior court, or by any other ways or means whatsoever. The same powers and authorities which were exercised by any former judges in this territory, are likewise accorded to them, with the exception of those cases wherein the act has otherwise directed, and of those where the form of government and constitution have opposed barriers to the ancient jurisdiction. The words of the act are manifestly comprehensive enough to include a power of administering complete relief, under the statutes of forcible entries, unless the kind of relief provided by them shall appear to be incompatible with the provisions of our bill of rights. But I cannot discern that the least invasion will be made of the constitutional rights of a citizen, by awarding a writ of restitution. It is certainly true, that no jury has passed upon the defendant's property; and if issuing this writ amounted to a decision upon that, it might be fairly argued that he was condemned unheard. But the law has declared, that whosoever enters upon the possession of another, with circumstances of violence and terror, shall, upon conviction, pay a fine to the State, and be deprived of the possession which he has thus wrongfully acquired It is no protection to the wrong-doer, that he had a righ. to the freehold or possession, or that he had before been unlawfully deprived of them; for the person who has used such violent methods of doing himself justice, is alike criminal with him who has not even the pretense of a right to assert. It was to guard the public peace, and to prevent the strong from forcibly ejecting the weak, that the several statutes upon this subject have been passed; and these objects are most effectually attained, when to a fine

is superadded a writ of restitution: thereby holding out to the offender, the absolute inutility of a possession acquired by forbidden means. Still, however, the right of possession, or of property, is not concluded; for the defendant may have recourse to those methods of establishing them which the law has provided. The jury having found that the possession was obtained by force, the legal consequence is, that the defendant is to be deprived of it for that reason, and the party complaining to be restored, he being the person through whom the constitution has been violated; for he has been deprived of his possession without a trial by jury, and without the sanctions of the law of the land. If the Superior Courts may entertain jurisdiction of indictments upon these statutes, and this they have done both before and since the revolution, then the act of 1777 contains an express provision which warrants them "to issue execution and all other necessary process thereupon." The latter words evidently embrace a writ of restitution, without which the justice held out by the statutes cannot be completely dispensed.

The extent of jurisdiction in criminal cases, both original and appellate, given to the Superior Courts by the act of 1777, and others subsequently passed, produces to a certain degree an analogy between these courts and others, whose jurisdiction can only be taken away by express negative words. And under such restrictions and qualifications as the constitution and principles of our government, as well as the arrangement of our judicature impose, the following description will apply to the Superior Courts: "That they may proceed as well on indictments found before the other courts, and removed into them by *certiorari*, as on indictments originally commenced in them, whether the courts before whom such indictments were found, be determined or suspended, or still *in esse*, and whether the proceedings be grounded on the common law, or on some statute making a new law concerning an old offence, and appointing certain justices to execute it, as the statutes of forcible entries, &c." 2 Haw., Pl. B. 2, c. 3, s. 3, 6. From these con-

siderations, I am inclined to believe, that the power of awarding a writ of restitution, is one of those which the Superior Courts may rightfully exercise.

I will now give my opinion upon the specific objections which have been made to the exercise of the power in the present case.

I apprehend that the first exception cannot be supported. "The term messuage is sufficiently certain and intelligible: by the grant of a messuage, the orchard, garden and curtilage will pass." Co. Litt., 5, *b*, and so by the devise of a messuage, though *cum pertinentiis* be not added. Cro. Eliz., 89, *b*. In an indictment for forcible entry and detainer, it is necessary to set forth the quality of the thing entered upon, as into a messuage, meadows, wood, &c., for entering into tenements generally is not good, because of the uncertainty. 2 Roll's Rep., 46. But some of the authorities shew, that the kind of possession of which the restitution is sought, should be stated with such certainty, as to evince that it is authorized by some one of the statutes. The present indictment will not warrant a restitution on the 8 Hen. 6, because it does not state that the place wherein the force was committed was the freehold of the party grieved, at the time of such force. Latch's Rep., 109. Nor are there any words in this indictment which necessarily imply that fact, as that the defendant disseized Isaac Hunter, which would be impossible, unless the freehold were his at the time of the force committed. 1 Haw., 284, s. 38. And if this point should be rendered doubtful by the contrariety of authorities, Yelvert, 28, still, it is necessary to sustain this application, that the defendant should have been charged with putting out and expelling Isham Parham, and disseizing Isaac Hunter. Yelvert, 165. The disseizin is the main point in such an indictment, and must be set forth in substance. 2 Roll's Ab., 80. But it is admitted by the counsel for the State, that this indictment is not grounded on 8, Hen. 6, but is maintainable on the 21 Jac., in support of which it is argued that the word *term*, technically signifies a lease for years, and that under the latter statute, a tenant for years

is entitled to restitution. Upon this point, the authorities are clear and explicit, that the indictment must state that the party was possessed of a term for years; and that possession, simply, or the possession of a term, is not sufficient; since, in the first case, it may be understood that he was tenant at will, and in the latter, that he was possessed for term of life. 1 Ventris, 306. I think it so plain, that upon this objection a writ of restitution ought not to be awarded, that it is unnecessary to give an opinion upon the rest.

Motion denied.

NOTE.—See *State* v. *Nations*, 1 Iredell's Rep., 325.

WILKINSON, Assignee, v. WRIGHT.—Page 341.

The act of 1786 (1 Rev. Stat., ch. 13, sec. 3,) making bonds assignable, did not operate upon bonds theretofore made.

This was an action of debt brought in Hillsborough Superior Court, upon a bond which was made before the act passed in 1786, by which bonds were made negotiable. —The question for the opinion of the court was, whether this action was maintainable by the assignee?

HALL, J. The first section of the act, entitled, "an act to make the securities therein negotiable," passed in the year 1786, c. 4, declares, that "all bonds, bills and notes, &c., shall after the passing of this act, be held and deemed to be negotiable, and all interest, &c., shall be transferable by indorsement, in the same manner and under the same rules, &c., as notes called promissory or negotiable notes have heretofore been." Its operation is not confined by express words to bills, bonds, &c., executed after that time; so that if the present question were to depend upon a construction to be made upon this section alone, independent of others in

the same act, perhaps it would not be improper to decide, that this action has been rightfully brought.

The proviso in the third section declares, "that this act shall not extend to, or have any operation with respect to any bonds, bills, &c., liquidated or settled accounts heretofore given or made." I think it is apparent, that this proviso is confined solely to the regulation of interest, because it speaks of liquidated or settled accounts, which are not included in the first section, and which are not made negotiable by this act. When the third section speaks of liquidated and settled accounts, it speaks of them as being subject to carry interest after a particular time, and places them, in that respect, upon the same footing with bonds, bills, notes, &c., then, when the proviso speaks of liquidated and settled accounts, it can mean nothing more as to them, than to ascertain the time when they shall be subject to the rules of interest in that section established. Nor do I think it means anything more as to bonds, bills, &c. Had it been intended that this proviso should, in any respect, control the whole act, it is not likely it would have been inserted in the middle of it; so that I think nothing can be collected from that proviso, decisive of the question before us.

The first proviso in the 5th and last section, declares, that "the act of limitation of this State shall apply to all bonds, bills and other securities, hereafter executed, made transferable by this act, after assignment or indorsement thereof, in the same manner as it operates by law against promissory notes."

It might not be a very strained construction, to say, that from the words, "bonds, bills and other securities hereafter executed, transferable by this act," it was the sense of the Legislature, that none but such as were executed after that time should be transferable by the act; and with this construction I am inclined to agree, and to be of opinion that the action is not well brought. If the impressions which heretofore have regulated the practice in this respect, are of any weight, they will serve to support this opinion. Suits have been seldom, if ever, brought, as far as I can learn, in

the names of assignees of bonds, executed before the passage of the act in 1786. I am of opinion that judgment should be entered for the defendant.

Taylor, J. I cannot collect, from any terms used in this act of Assembly, that the Legislature meant to give it a retrospect beyond the time of its commencement; and a construction of that kind ought to be adopted in those cases only, where it naturally and necessarily arises from the words.

The act does not, according to the policy observed in some of the States, merely enable the assignee of a bond to sue in his own name; leaving him still liable to the equity, which the obligor might claim against the obligee: It goes further, and places the assignee of a bond upon the same footing with the indorsee of a note. The latter, in case of an indorsement before the note is due, will be permitted to recover against the maker, notwithstanding any payments made by him to the original payee, and notwithstanding any illegality in the consideration of the note; except in the cases of gaming, usury, coverture and infancy.

If the act of 1786 be construed to extend to bonds executed before that time, obligors may be deprived of just advantages, and exposed to inequitable recoveries by assignees, which could by no means be foreseen when their contracts were entered into. It ought not, therefore, to be presumed, that the act meant to destroy or impair rights which existed before its commencement. 2 Mod., 310.

If it should be thought, that the proviso added to the third section, is not co-extensive with the whole act, but intended, merely, to confine the rule of computing interest to contracts thereafter to be made; still I think, that the proviso in the fifth section, explains what contracts the Legislature meant should be comprehended in the act. The object of this latter proviso is, to apply the statute of limitations to bonds, bills and other securities, after the assignment or indorsement thereof: If it were intended to confer upon bonds executed before the act, the quality of negotiability, it is just as reasonable and necessary to apply the statute of limita-

tions to them, from the time of their indorsement, as to bonds executed after the act; and as there can be no policy in subjecting the latter to the operation of the law, whilst the former are unaffected by it, a construction leading to such a consequence, ought to be avoided. On this ground, therefore, I conceive the words of the proviso, "all bonds, bills and other securities hereafter executed, made transferable by this act," as descriptive of the contracts which were alone intended to be comprised in the act.

Judges JOHNSTON and MACAY concurred.

Judgment for the defendants.

ANDREW BROOKS v. ELI COLLINS.—Page 345.

Under the act fixing the jurisdiction of the County Courts at twenty pounds, the defendant should have pleaded that the sum due was less than twenty pounds when the action was commenced—otherwise the court will not, on motion, after verdict finding less than twenty pounds, set aside the verdict and enter a nonsuit.

This was an action of assumpsit instituted in the County Court of Orange. The damages laid in the writ were above twenty pounds. After a trial in the County Court, it was brought up to Hillsborough Superior Court by appeal.

Upon the trial of the cause, it appeared that the parties being tradesmen, had worked together for their joint emolument, until they earned thirty-two pounds, when they came to a settlement, and the balance of eight pounds was found due to the plaintiff. They afterwards continued to work until they earned one hundred and six pounds more, the whole of which sum was received by the defendant. The plaintiff admitted the receipt of fifty pounds from the defendant, on which evidence the jury gave a verdict for the plaintiff, assessing his damages to eleven pounds seventeen shillings and sixpence.

A rule was obtained on the plaintiff, to shew cause why the verdict should not be set aside, and a nonsuit entered.

Norwood shewed cause. These two principles of law, on the doctrine of nonsuits, are established and known: I. That a plaintiff cannot be nonsuited before the jury leave the box, but with his own consent. 2 Term, 275: II. That the court will not permit him to enter a nonsuit after the jury have returned, and declared their verdict. He has the right of putting his cause to the jury and risking a verdict, if he thinks proper; but should he do so, and the jury find against him, then he cannot enter a nonsuit, because such a practice would give him the advantage over the defendant, of receiving the verdict if in his favor, and destroying it if against him. To enter a nonsuit on the rule obtained in this suit, would be contrary to both these principles of law, and give to the defendant that advantage which is denied to the plaintiff.

The practice of granting such rules, if established, will give the defendant another advantage over the plaintiff: he may omit to move for a nonsuit before the evidence is closed, when, perhaps, it would be in the plaintiff's power to supply the defect relied on by the defendant; and after a verdict is entered against him, move for and obtain this rule, set aside the plaintiff's verdict, and enter a nonsuit in its stead. But if such rules are refused, and the defendant compelled to move for a nonsuit before the jury retire, these evils will be prevented, and the parties stand on equal ground. For should the plaintiff refuse to be nonsuited, and obtain a verdict on evidence materially defective, the defendant would be entitled to, and might easily obtain a new trial; but I apprehend that even in such a case, he ought not to set aside the verdict and enter a nonsuit in its stead, unless on a rule entered by consent.

The practice in England of granting rules, somewhat similar to the one in this suit, is modern; and it has not, it appears to me, been sufficiently attended to in this State. I suppose that practice to be founded on the statute of 14 Geo. 2, c. 17, which provides, "that if the plaintiff neglects to

bring the issue to trial according to the course of the court, the court, on motion or notice, shall give judgment as in case of a nonsuit, unless they allow further time; and that the defendant shall recover his costs." If the rule in this suit is not founded on this statute, it is not supported by any one principle of law: and if intended to be founded on this statute, it must be discharged, for the issues were brought to trial according to the course of the court, and the plaintiff obtained a verdict well warranted by the evidence. 1 Bur., 358. But whether the rule is founded on that statute or not, it is a clear principle that the rule shall be discharged, unless a nonsuit, if moved for before the jury returned, would have been proper and legal. In this case, it is not pretended that such a nonsuit would have been legal; the rule, therefore, ought to be discharged. If the County Court had jurisdiction in this case, the plaintiff is certainly entitled to a judgment; and that the court had jurisdiction, I think on the examination of the several acts, there can be no doubt. The first act on the subject is that of 1777, c. 2, s. 61, by which jurisdiction is given to the County Courts in all cases where the debt is above five pounds. By the same act, s. 69, jurisdiction is given to a single justice in all cases where the debt is five pounds or under. The next act is that of 1785, s. 4. By this act, the jurisdiction of a single justice is raised to ten pounds. Under this act, the County Courts and justices had concurrent jurisdiction of a debt of ten pounds, and of all sums between that and five pounds. The act of 1786, c. 14, s. 7, is next. This raises the jurisdiction of a single justice to twenty pounds, and contains this proviso: "provided also, that no suit shall be commenced in the first instance, returnable to the County Court, for any sum under twenty pounds." This proviso appears to me, to relate to the suit only, and the sum mentioned in the writ, and not to the balance which may be found on a settlement of the accounts, due the plaintiff: And in this construction I am supported by a decision. Haywood's Rep., 122, and the universal opinion, that if the defendant pleads in abatement, "that the balance due the plaintiff is

not twenty pounds," the plaintiff may well reply the writ for a larger sum. For if this construction is not good, the replication would be bad on demurrer; and what may be pleaded in abatement, can never afterwards be taken advantage of: This construction will not render the proviso nugatory; it will still prevent suits on all bonds for small sums: It certainly ought not to extend to the balance on long and great accounts, in the settlement of which are frequently involved the greatest intricacy and difficulty. It often happens, that the plaintiff does not know the balance due him on such accounts, and that he forms erroneous opinions of the law arising on them; and shall he, in such a case, after he has prosecuted his suit to a verdict, be nonsuited, because that verdict does not happen to amount to twenty pounds? If my construction be not the true one, great evil and injustice will be the consequence of a decision in this case. The law is positive; it leaves no discretion in the court, and must be carried into execution in all cases. The court could not take notice of any claim or demand set up by the plaintiff, unless proved and found by the verdict. The Judges of the Superior Court, by act of Assembly, have a discretion in such cases; but the County Courts would have none. If a plaintiff should honestly enter on his accounts the credits to which the defendant was entitled, leaving a balance of above twenty pounds due him, and bring his suit; if he should, by any accident or misfortune fail to prove an *item* on his account, he would be nonsuited and have the costs to pay. Creditors whose demands were not much above twenty pounds, would be under the necessity of leaving out of their accounts all *items*, however just, the proof of which was doubtful, so as to bring their debts within the jurisdiction of a single justice. This proviso is omitted by the act of 1794, c. 13, and I contend that the seventh section of the act of 1786 is entirely repealed by the twenty-third section of this act; and that the County Courts and justices have concurred jurisdiction of debts of twenty pounds, and of all debts under that sum and above five pounds, and insist that the rule in this case ought to be discharged.

Hall, J. This is an appeal from the County Court. The jury in the Superior Court have found a verdict for a sum under twenty pounds; a motion is made by the defendant's counsel to set aside the verdict, after it is recorded, because the County Court, in the first instance, had not jurisdiction, the sum being under twenty pounds. The verdict being recorded, I think it ought to stand. This motion, in substance, might have been made at an earlier stage of the proceedings; had that been done, in all probability it would have been granted.

Taylor, J. The question in this case is, whether the verdict shall be set aside and a nonsuit awarded, upon the ground that the recovery is for a sum under twenty pounds, the suit having been commenced in the County Court. The act which regulates the jurisdiction of the Superior Courts, by the value of the suit, gives power to direct a nonsuit, 1. Where a greater sum is demanded than is due, on purpose to evade the act: 2. Where a suit is commenced contrary to the true meaning of the act. But if the recovery is less than the sum which marks the jurisdiction, still, if an affidavit be made that the sum sued for is due, and that the want of proof or the lapse of time has prevented a recovery, then judgment shall be rendered for the amount legally proved. No difficulty has arisen in the practice under this act; the regulations of which afforded a clear and satisfactory guide, so far as they extend.

As to the jurisdiction of the County Courts, the subject is left at large, except in regard to the sum for which the suit is brought; the act is silent as to the manner in which the question shall be examined, and as to the judgment which shall be given; nor doth it either allow or prohibit the recovery of a less sum than twenty pounds. The intention of the Legislature seems to be clear enough as to the object—that a single justice should have jurisdiction of all debts of the kind specified in the act, of twenty pounds and under, and that the County Court should have original jurisdiction of the same debts: As to these, therefore, the jurisdiction of the magistrate must be exclusive, and

that of the County Court merely appellate; and thence we may draw the certain conclusion, that the sum laid in the writ, being above twenty pounds, is not, of itself, sufficient to give jurisdiction to the County Court, if the debt be under that sum: For the writ, except in a few instances, where of necessity it must correspond with the demand, furnishes no evidence of the sum really due. Under a different conitruction, the act of 1786 might be evaded in numerous cases, at the pleasure of the plaintiff, and the jurisdiction of a single magistrate totally absorbed in that of the County Court.

The question then occurs, shall the sum recovered, ascertain the jurisdiction of the County Court. I conceive that this would be a rule equally fallacious with that drawn from the sum laid. The plaintiff may recover less than twenty pounds, when his debt is really more. A witness summoned to prove an item in his account may be absent: the defendant may lessen the debt by a set-off, or bar part of it by pleading the statute of limitations: In none of which cases, do I think it would be right to withhold the judgment of the County Court for the sum recovered, though less than twenty pounds. The sum for which a suit is in substance instituted, is that which the defendant owes at the issuing of the writ. If the parties have opposite demands against each other, which are connected, from having taken their rise in the same transaction, or otherwise, then the balance is the debt, and that being less than twenty pounds, when the suit commences, cannot be recovered by action. But if the opposite accounts begin in distinct transactions, and are unconnected, each demand is a legal debt, and recoverable by action. 1. Bl. Rep., 651; 4 Bur., 2133; 5 Term, 135; 3 Term, 599. Now it is entirely at the option of the defendant, whether he will set off his demand or not. The plaintiff cannot compel him to do it, and before the suit, it cannot be known whether it will be done, or even what the amount of the opposite demand is. It would be hard, therefore, if by setting off, the plaintiff were prevented from recovering his debt in the County Court, and equally so, if he, under the belief that it would be set off, and thereby reduce his claim

to a less sum than twenty pounds, should begin the business by way of warrant before a magistrate, and the defendant should then withhold the set-off. 2 Wils. Rep., 68; 3 Wils. Rep., 48. The same observation will apply to the statute of limitations, which may or may not be pleaded, at the defendant's option, and which, though pleaded with effect, leaves the plaintiff's debt unextinguished; since it may be revived by a subsequent promise. In cases of this kind, therefore, the proper enquiry seems to be, not whether the sum contained in the suit is more than twenty pounds, or that found by the jury less; but what was the amount of the plaintiff's debt when the suit was brought. It is desirable that some regular and uniform practice should be established as to the mode of taking advantage of the smallness of the sum. My own opinion is, that the most regular way would be to plead, that the sum due was less than twenty pounds when the action was commenced; though upon the general principle relative to the jurisdiction of inferior courts, I am far from thinking that this is the only method. It would save time and expense, if the matter were brought before the court, by way of motion to stay proceedings, before the trial; when the amount could be enquired into upon affidavit, as is practiced in analogous cases. 5 Term, 64; 4 Term, 495. Or the objection might be taken at the trial, so as to give the plaintiff an opportunity of submitting to a non-suit, should the opinion of the court be against him. But I think the practice would be inconvenient and unjust, to permit the defendant to avail himself of this objection, when he makes it for the first time after the jury have found their verdict. Taking this to be the case, from the record sent up, I am in favor of the plaintiff's having his judgment; since his adversary has submitted his cause to the jurisdiction of the court, in every stage, except the last, of its progress.

Rule discharged.

NOTE.—See *Anonymous*, 2 Hay. Rep., 71.

THOMAS CUNNINGHAM'S HEIRS v. THOMAS CUNNINGHAM'S EX'RS.—Page 353.

Slaves cannot take anything under a devise for their maintenance.

This was a case sent up from Wilmington Superior Court.

Thomas Cunningham, in September, 1792, duly made his last will and testament, by which, amongst other things, he devised as follows: "It is my will and desire, that five feet of an alley be left from Front street to low water mark, as convenient as may be to the after bequeathed lot, then I will and desire that forty feet back, including the house where Mr. Potts is now resident, be at the expiration of the lease rented out for the maintenance of a negro woman of mine, named Rachel, and the maintenance and education of her three mulatto children named Mary, Ritty and Chrissy, and the child of which she is now pregnant." After devising part of a lot to Edmund Robeson, the will proceeds thus, "and the rest and residue of the said lot to be rented yearly for the maintenance of Rachel and her three children, already named, with the child of which she is now pregnant; with all the rest of the land lying between Lee's creek and Deep Inlet creek, between Rachel and her three children, share and share alike, to them and their heirs.

"*Item*. I will and desire that my negro men, Virgil and Quash, together with my negro woman Tamer, should live on the plantation where I now reside, on Lee's creek, to work for the maintenance of Rachel's children, during the natural life of the said negroes. *Item*, I will and desire that Rachel and her children should be set free immediately after my decease."

The defendant, as executor of Thomas Cunningham, the testator, took possession of that part of the real estate, the rents of which are directed by the will to be applied towards the maintenance and education of the negro woman Rachel and her children. For this part of the estate the action was brought.

Rachel and all her children, before and at the time of making the will, and ever since, have been slaves.

For the defendant, it was insisted, that by the words of the will, he is entitled to the possession of the real estate, in order to receive the rents and profits, and to pay the same to the negro woman Rachel.

The plaintiff's claim was rested on the following grounds: I. That supposing the words of the will are sufficient to pass the estate to the negro woman Rachel and her children, yet, by law, negro slaves are incapable of taking or holding real estate: II. And admitting they are capable, yet there is no express devise of the lands in question to the executors; consequently, the lands descend to the plaintiffs, as heirs-at-law of the testator.

Hall, J. I think that the devise in question is void, and cannot take effect. The maintenance and education of some of the devisees, is what the testator appears to have been anxious for. How can it be effected? They are slaves, and their owners have a right to them and their services; if they are educated, it must be by his permission, and if it is attempted without, it is a violation of his right. If this property had been conveyed in trust for the same purpose, a performance of the trust could not be compelled in a Court of Equity, for the same reason. Admit that they could bring a suit to recover this property, after a recovery, could they have a right to enjoy it? Suppose the owner took it from them, would they have a remedy against him? They certainly would not.

Taylor, J. The intention of the testator seems plainly to have been, to transfer the beneficial interest in the lands to Rachel and her children; and were there no legal impediments to the effecting of such an object, I should think the words made use of equivalent to an express devise of the land. But it is indispensible to the validity of every devise, that there be a devisee appointed who is competent to take: Slaves have not that competence; for a civil incapacity results from the nature and condition of slavery. And it would be a solecism, that the law should sanction or permit

the acquisition of property by those, from whom it afterwards withholds that protection without which property is useless. From this principle, an important difference arises between slavery, as it is established in this State, and the the condition of villeinage, as it existed in England prior to the stat., Car., 2. A villein might bring an action against any person who did him an injury, except his lord; and even against him in some particular cases. If, therefore, he purchased land, although the lord might enter upon it, and seize it to his own use; yet while he permitted the villein to hold, the land would descend to the children of the latter, in a regular course of descent; and the law, while it furnished them with a remedy against any who should disturb their possession, also gave them, in time, a title by prescription against their lords. A villein might also, lawfully dispose of what he had acquired, if he completed the transfer before his lord made a seizure.

In all these instances, the characteristics of slavery are different; for a slave can bring no action; he can neither acquire nor transfer property, by descent or purchase; nor will prescription avail him, to assert a title against his master. The devise cannot, therefore, in the present case, operate anything.

Judges JOHNSTON and MACAY concurred.

Judgment for the plaintiff.

Jocelyn, for the plaintiff.

Sampson, for the defendant.

NOTE.—See *Haywood* v. *Craven*, 2 Car. Law Repos., 557; *Wright* v. *Lowe*, 2 Murph., Rep., 354; *Huckaby* v. *Jones*, 2 Hawks. 120; *Turner* v. *Whitted*, Ibid, 613; *Stephens* v. *Ely*, 1 Dev. Eq. Rep., 493, *Sorry* v. *Bright*, 1 Dev. & Bat. Eq. Rep., 113; *Pendleton* v. *Blount*, Ibid, 491; *White* v. *Green*, 1 Iredell's Eq. Rep., 45. By an act passed in 1830 (1 Rev. Stat., ch 111, sec. 59,) a testator may emancipate his slaves by his last will, upon condition of their being removed out of the State; and if they are thus emancipated and sent out of the State they may take property bequeathed to them under the same will. *Cameron* v. *Commissioners of Raleigh*, 1 Iredell's Eq. Rep., 436.

CHARLES KENNON v. ROBERT DICKINS.—Page 357.

In Equity, as a general rule, interest upon interest is not allowable. But when the sum is ascertained and the annual payment of it forms part of the contract; where it is not so specific that an action of debt may be sustained, and interest recovered by way of damages for the detention, and particularly where the payment of the principal sum is postponed to a very distant period, upon the faith of the regular and punctual discharge of the interest, interest upon interest ought to be allowed.

This was a case from Hillsborough Superior Court. The bill stated, that the complainant on the 15th of September, 1771, contracted with the defendant for the purchase of several taacts of land; and that the intention and understanding of the parties was, that one thousand pounds, Virginia money, was to be the price of the land, to bear interest from the first of December, 1771; that there was to be a credit of fifteen years for the payment of the principal sum, but the interest, computed at six per cent. was to be paid annually; and if at any time the complainant should pay a larger sum than the interest due, the excess should be applied to the extinguishment of the principal.

The complainant gave his bond, dated September 30, 1771, in the penalty of two thousand pounds, Virginia money, with Lewis as security, to which was annexed the following condition: "The condition of the above obligation is such, that if the above bound Charles Kennon and Howell Lewis, do and shall well and truly pay unto the said Robert Dickins, &c., the just sum of sixty pounds, current money of Virginia, annually, for the term of fifteen years, on or before the fifth day of December in every year, and after the expiration of the term of fifteen years, viz.: on or before the fifth day of October in the year 1786, the further sum of one thousand pounds, current money as aforesaid, then the above obligation to be void, &c. *Memorandum*, that if any part of the within principal shall be paid before the expiration of the fifteen years, in that case the part paid to carry interest no lon-

ger than to the time the same was paid." The bill then stated, that on the tenth of December, 1771, the complainant paid the sum of one hundred and eighty-four pounds, six shillings and six pence, which after deducting the interest of the ten days due, left a balance of one hundred and eighty-one pounds, eleven shillings and three pence, that ought to have been applied to the discharge of the principal, and that afterwards various other payments, which are specified in an account annexed to the bill, were made, and which, if properly applied, discharged the whole of the debt: Instead of which, an execution has issued for the sum of one hundred and fifty pounds, by reason of the defendant's charging interest on the sixty pounds payable annually, which being itself the interest of the thousand pounds, ought not to bear interest. The complainant alleged that this is usurious, and directly against the intention of the parties, as well as the memorandum annexed to the bond.

The defendant, in his answer, affirmed that he intended the price of the land to be nineteen hundred pounds, Virginia money, payable in fifteen annual instalments, at sixty pounds each, and the last payment to be one thousand pounds; and he understood that if default was made in the payment of any of the instalments, that they should bear interest from the time they respectively became due. He conceives that the condition of the bond furnishes evidence of this, by arranging the payment at different and distant days. He believes the intention of annexing the memorandum to the bond was, that if the complainant should pay any part of the money before the time it became due, that such payment should bear interest until the next day of payment. He admits the payment on the 10th of December, 1771, but insists that the first instalment of sixty pounds, as well as the ten days interest, were then due. He likewise admits the other payment charged in the bill, and says that their application, according to the true intent of the contract, left a balance due on the 20th of April, 1792, of one hundred

and fonrteen pounds and ten pence, for which he has taken out execution.

Norwood, for the defendant. Supposing the purchase-money to have been one thousand pounds, and the instalments the interest of that sum, according to the complainant's allegation; yet the case comes expressly within the exceptions to the general rule, that interest shall not bear interest. These exceptions have been extended to the following cases: Judgments at law bear interest upon the accumulated sum of principal and interest. 1 Bl. Rep., 267. A master's report, 1 P. W., 653: so with the assignee of a mortgage. 1 Ca. Ch., 258. The parties, by agreement, may make interest principal. 4 Term, 613; 1 Ves. ju., 451. And where a mortgage deed contained a special clause of redemption, by which it was agreed that the debtor should pay one thousand pounds at a future period, and sixty pounds interest in the mean time, by half-yearly payments, it was decreed, that the interest reserved in the deed, should be reckoned principal. 1 Ver., 190. An annuity also, though it is the nature of interest, shall carry interest. 2 Eq. Cas. abr., 530.

But the defendant positively answers, that the fifteen annual payments are principal, as well as the last payment; and the memorandum refers to the within principal. The bond must therefore be examined, to ascertain the intention of the parties; and upon the face of this, it appears that all the instalments form principal. Upon the complainant's own principles, however, his statement is erroneous. The first annual instalment was due the first of December, 1771; the first payment made by the complainant was on the tenth of that month: yet he deducts the whole of that payment from the thousand pounds, which he is pleased to call principal, without regarding the sixty pounds then due.

*By the Court.** According to the complainant's allegation, the parties understood the purchase-money to be, one thousand pounds, Virginia currency, to bear interest at six

*Judges Johnston, Macay and Taylor.

per cent. payable annually, with a credit of fifteen years for the payment of the principul sum. On the other hand, it is affirmed by the defendant, that the price of the land, as intended and understood by him, was nineteen hundred pounds, Virginia currency, payable by instalments, according to the terms of the bond; the condition of which, as far as it has any weight in explaining the original transaction, gives countenance to this statement. If it be adopted, as the ground on which the case is to be decided, no doubt can be entertained, that the instalments bear interest from the time they respectively became due; for being principal debts, and secured by specialty, such a consequence follows of course. But even if the complainant's statement were assumed, as a true representation of the contract, and these instalments of sixty pounds considered the interest of the principal purchase money, still the authorities cited go a great length towards shewing that a Court of Equity might justly sanction the recovery of interest, upon a failure in payment according to the agreement of the parties. As a general rule, interest upon interest is not allowable. But, when the sum is ascertained, and the annual payment of it forms a part of the contract; where it is so specific that an action of debt may be sustained, and interest recovered by way of damages for the detention; and particularly, where the payment of a principal sum is postponed to a very distant period, upon the faith of a regular and punctual discharge of the interest, it ought in justice to be allowed. To such a case, the principal upon which interest is generally allowed, seems to apply with strict propriety, viz: to supply the place of prompt payment, and indemnify the creditor for his forbearance.

Injunction dissolved.

JOHNATHAN DAVIS and wife, et al. v. GREEN DUKE, Adm'r of William Duke.—Page 361.

Advancement of personal property made by an intestate in his own life-time to his children, are under the act of 1784 (1 Rev. Stat., ch. 64, sec. 1) to be brought into distribution for the benefit of the widow.

This case was brought from Halifax Superior Court. A petition was filed by the widow and next of kin, to obtain distribution of the intestate's, William Duke's estate. The County Courts had referred the accounts to commissioners, who reported that the petitioner Mary, the widow of William Duke, was entitled to an equal share with the children, of the intestate's personal estate, including the advancements made by the intestate in his life-time, to his children. Part of the estate, however, was disposed of by a nuncupative will, which was not brought into the account. The exception to the report was, that the widow is not by law entitled to a share in the advancements to the children.

Baker argued in support of the exception, that it was plain from the words of the act of distribution, that a child advanced by the intestate in his life-time, was to have an equal share with the other children, and that what he had received was not to be brought in for the benefit of the widow. To her was allotted by the act of 1766, one-third of the surplus, and in directing the division among the children, she is not brought into view. Accordingly it has always been held, the widow was not entitled under that act. That although, by the act of 1784, the provision for the widow was differently modified, yet no allowance was made her with respect to a child's advancement. If this had been intended by the Legislature, they would have expressed it in some of the laws by which this subject had so frequently been brought before them.

Haywood, for the petitioner, admitted that the construction contended for on the other side, was the true and

proper one, under the two acts of 1715 and 1766; but he argued that, from the scope and design of the act of 1784, as well as the phraseology it uses, it may be clearly inferred that the law is now different. The first acts referred to, provide that the widow should have "one-third part of the surplus." This was allotted to her, without any regard to the number of children, or any view to make her share equal to theirs. But when the Legislature, by the act of 1784, aimed to make an equality between her and the children, instead of *surplus*, they say *personal estate*: and wherever there are more than two children the widow shares equally with all of them, she being entitled to a *child's part*. It is also proper to be noticed, that the act of 1792, cap. 7, sec. 2, declares the intention of the former law to have been, to make the distribution of intestates' estates equal, without confining the principle to the children. From this view of the subject it will appear that the report is framed with propriety.

*By the Court.** That the act of 1766, appointing a method of distributing intestates' estates, was intended to produce the most perfect equality amongst the children, with respect to the distribution of their intestate father's estate. With this view, the material parts of the statutes of 22 & 23 Car., 2, and 1 Jac., 2, are incorporated into it: Whatever construction, therefore, is correct, in relation to those statutes, must be so with respect to this act, which has taken them for its basis, and which has even literally followed such of their provisions as affect this case. The law declares that no child who hath received an advancement (except the heir-at-law) of an equal value with a distributive share, shall have any part of the surplus with their brothers or sisters: but if the estates so given them are not equal to the other shares, the children so advanced shall have so much as will make them equal. This act entitled the widow to a fixed proportion of the estate, not liable to be varied by the number of children, though it was increased if there were none. To

*Judge Hall gave no opinion, having been of consel in the cause.

make the children's shares equal with each other, was the design of the law; but to make the widow equal with the children, though it might happen in some cases, formed no part of the policy of the act. It has therefore been properly decided, that a widow can derive no benefit from an advancement, which is brought into hotchpot. But the act of 1784 extends to the widow that principle of equality which was before confined to the children, and in all cases where there are two or more, she is equally entitled to the personalty with them. This is evident from the law using the expression "a child's part," which *ex vi termini*, imports as large a share as any child has. Now if an advancement were brought in for the benefit of the children, to the exclusion of the widow, this act, made to improve her condition would, in many instances, have a contrary effect; because, instead of the third, to which formerly she had a certain claim, her proportion must depend upon the number of claimants. The exception therefore ought not to prevail.

Report confirmed.

Note.—See acc. *Littleton* v. *Littleton*, 1 Dev. & Bat. Rep., 327.

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[1]THE STATE v. WILLIAM JEFFREYS.—Page 364.

The court will not quash an indictment for petit larceny, unless the defect be very plain and obvious. Hence they refused to quash where the caption of the indictment was as follows: "State of North Carolina, Franklin County, March Sessions, 1798."

This was an indictment for petit larceny, brought from Halifax Superior Court, the caption of which was in these words: "*State of North Carolina*, Franklin County, March sessions, 1798."

The defendant's counsel moved that it might be quashed, because it did not appear on the face of the indictment,

before what court it was taken, nor indeed that it was taken before any court. Every caption of an indictment ought to shew that it was taken before a court which had jurisdiction of the offence. 2 Haw, 359, s. 119.

Attorney General, in reply. Admitting that before the year 1784, a formal caption was necessary in such a case, yet the act of Assembly of that year, c. 34, has cured all defects of this sort, unless it can be said with propriety, that the caption is part of the indictment. That act repeals a former one, by which an adequate compensation was allowed to those law officers whose duty it is to draw indictments in the county courts; but the repealing act fixes so small a fee as the recompence for each indictment, that the Legislature must have forseen, that neither the skill nor the circumspection which are requisite to draw indictments, with technical preision, could be tempted into the service of the country. Against the inconveniencies which would naturally arise from this regulation, they have endeavored to provide, by enacting, "that no bill of indictment or presentment shall be quashed, or judgment arrested, for or by reason of any informalities or refinements, where there appears to the county court sufficient in the face of the indictment, to induce the court to proceed to judgment." These words appear to be sufficiently extensive to embrace every possible defect, provided the sense and substance can be collected from the indictment. If the Legislature were now about to remedy, by a law, such defects as the one under consideration, they could not, in my apprehension convey their meaning more forcibly than they have done by the expressions they have employed; unless, indeed, they were to enumerate all the defects they intended to remedy, which would be absurd. It cannot be imagined, that the Legislature deemed it of no consequence to remedy defects in the caption, while they were convinced of the necessity of remedying those in the body of the indictment; for it is probable that the bill was drawn by a lawyer, and any person in the least degree conversant with such subjects, knows that the task of framing captions with accuracy, is more diffi-

cult than that of drawing the other parts of a bill. A caption is undoubtedly a part of a bill of indictment; it is the introduction to the other parts, is on the same paper, and must be conjoined with the bill itself. It is therefore within the act which declared "no bill of indictment, &c."

*By the Court.** Whenever an application is made to the court to quash a bill of indictment, it should be founded on such an objection as is obvious and palpable; for if the question be susceptible of doubt whether the exception is fatal or not, the party will be put to plead or demur. The act of Assembly contains expressions of very comprehensive import, and certainly takes away the force of many exceptions to an indictment in the county court, which would still prevail if made in the Superior Court, to an indictment originally found there. It presents to the county court this question—Do you see enough upon the face of the indictment to induce you to give judgment? If this appears, by the plain deductions of common sense, though the terms of art be omitted, either in the description of the offence, the mode, the place, or the time of its commission, the indictment must be sustained. It is possible, therefore, that enough appears in the caption of this indictment to warrant an intendment, that it was found at Franklin county court; for to what else can the word "sessions" be referred? But upon this, we give no positive opinion; for it being discretionary with the court, whether they will grant this motion or not, we do not think any argument in its support can be drawn either from the crime itself or the nature of the objection.

Motion overruled.

NOTE.—See *State* v. *Roach*, 2 Hay. Rep., 352, and the cases referred to in the note. See also *State* v. *Wasden*, N. C. Term Rep., 163.

*Judge Hall gave no opinion, having been of counsel in the cause.

JUNE TERM, 1802.

RICHMOND PEARSON, et al. v. OBADIAH SMITH.—Page 367.

Possession will support trespass against a party, who interrupts that possession by force.

This was an action of Trespass *quare clausum fregit*, brought by the plaintiffs in Salisbury Superior Court of Law, for the purpose of trying their title to a fishery in the river Yadkin. On the trial at September term, 1801, the Jury found a special verdict, viz:

"The jury find, that on the 20th day of December, 1791, the State, by a patent deed granted the land mentioned and included in the lines and boundaries described in the plaintiff's declaration to William Giles; and that all of the said land so included in the said boundaries, is the bed of the river Yadkin, covered with water, except about one acre and a little bar or sand bank, about the middle of the river, which is not usually or commonly covered with water, and is not a natural but an artificial bank, raised by some persons for the purpose of fishing, prior to the date of the said grant.

"That afterwards, to-wit, on the sixth day of January, in the year 1792, the said Wm. Giles conveyed the said close so included as above, to the plaintiffs Richmond Pearson and Henry Giles, who afterwards, to-wit, in the month of March in the year 1792 aforesaid, previous to the bringing this action by the plaintiffs, was in the actual possession thereof; and being so thereof in the actual possession as aforesaid, the said defendant did forcibly enter therein, and drive away certain persons there fishing for the use of the plaintiffs, and under their permission.

"The jury further find, that many years ago, at what precise time the jury are ignorant, the said fishing bar was a shallow of the river, and by the work and labor of some persons to the jury here unknown, was raised as above set

forth; and that on or about the month of April in the year 1781, the same bar was in the use and occupation of the said William Giles and one Charles Baxter, which said Baxter sold his share thereof, or such interest, if any he had therein, to the said Obadiah Smith.

"And the jury further find, that the said Obadiah Smith, the defendant, hath never entered the same in any land office in this State, or obtained any deed or grant thereof from this State. But whether or not the said place, &c."

By the Court. The jury having found, that the defendant drove the plaintiffs from their *possession by force*, there can be no doubt that he was *guilty of a trespass;* therefore judgment should be entered up for the plaintiffs.

NOTE.—See *Myrick* v. *Bishop*, 1 Hawks, 485; *Smith* v. *Wilson*, 1 Dev. & Bat. Rep., 40.

STATE v. DANIEL HENDRICKS.—Page 369.

An indictment, charging the offence to have been committed in November, 1801, and in the 25th year of American Independence, held to be bad, and the judgment arrested, because the offence is charged to have been committed in two different years.

The defendant was indicted for horse stealing in Salisbury Superior Court of Law, March Term, 1802. The indictment laid the offence "on the thirtieth day of November, in the year of our Lord one thousand eight hundred and one, and in the 25th year of the Independence of the State." The defendant being tried and convicted on this indictment, moved in arrest of Judgment, and assigned the following reason, to-wit. "The offence laid in the bill of indictment, is charged to have been committed in the twenty-fifth year of American Independence; whereas in truth and in fact it was done in the twenty-sixth year of the said Independence, as is apparent in the form of the indictment."

By the Court. The fact is charged to be committed on the 30th day of November, in the 25th year of the Independence of the State, and in the year of our Lord 1801, which is in the 26th year of Independence; therefore charged to have been committed in two different years; which is contradictory, and vitiates the indictment.

No indictment can be good without *precisely* shewing a certain year and day, of the material facts alleged in it. 2 Hawk. P. C., 235. It is certain that if the indictment lays the offence on an uncertain or impossible day, as where it lays on a future day, or lays one and the same offence at different days, &c., it will be held bad. *Ibid.* This is expressly the case in question. The offence is charged to have been committed on the same month in two different years, which is impossible. We are therefore of opinion, that the judgment should be arrested.

NOTE.—See *State* v. *Sexton*, 3 Hawks, 184; *State* v. *Woodman*, Ibid, 384.

HUDSON HUGHES, et al. v. THE TRUSTEES OF THE UNIVERSITY.—Page 370.

Where confiscated lands were sold by the State and the contract afterwards relinquished and the lands surrendered to the State before the year 1794, the lands passed to the University of that year. (See 2 Rev. Stat., page 428.)

The complainants filed their bill in the Court of Equity for Salisbury district, at March Term, 1800. By the bill it appears, that the complainants Hudson and Joseph, in the year 1795, purchased a tract of land of the defendants, who sold by Adlai Osborn their commissioner and attorney, which land was claimed by them as having been the property of Henry E. McCulloch, consequently confiscated, and by the act of Assembly passed in the year 1794, granted to and vested in the defendants; that in August, 1795, the said

Adlai Osborn, in the name of the defendants, executed to them a deed, sufficient in legal form to convey to them the land in fee simple; and that they at the same time, with Edward Yarborough their security, executed a bond to the defendants for the payment of the purchase money of the said land. The bill then charged that the land had been sold by the State to one Brandon, before the passage of the said act, who before that time had, by petition, prevailed on the Legislature to dissolve the contract, by releasing him from the payment of the purchase money, and receiving the land again, to the use of the State. That the defendants had commenced an action at law on the said bond, and threatened to compel the complainants to pay the said purchase money, and insisted that the land so sold to them, was not within the meaning and operation of the said act, and that the defendants had no title to the same. The complainants prayed an injunction, &c., until the question on the operation of the act should be judicially settled, &c. An injunction was accordingly granted; and the usual proceedings being had, the bill was taken *pro confesso*, and the cause heard on the bill.

By the Court. By the act of 1794, it is contemplated that the remnant of confiscated property unsold by the commissioner, might contribute to furnish means for a permanent establishment, &c. Then it gives it all the lands not heretofore sold, &c. We are of opinion that the purchase by Brandon being relinquished before the grant to the Trustees, and the estate being then in the State, that it passed with the other property, and was vested in the trustees in the same manner, and that they had as good a right to convey it, as they had to convey any other confiscated property.

JESSE BRUTON'S EX'RS v. LEN H. BULLOCK'S EX'RS.—Page 372.

Contracts in depreciated currency should be scaled according to the rate existing at the time the contract was made.

Len H. Bulluck executed to Jesse Bruton a bond in these words, to-wit: "I promise to pay to Jesse Bruton, his heirs or assigns, the sum of fifteen hundred pounds, proclamation money, to-wit, three hundred pounds on the third day of August, 1775; three hundred pounds on the third day of August, 1776; three hundred pounds on the third day of August, 1777; three hundred pounds on the third day of August, 1778; and three hundred pounds on the third day of August, 1779, for value received, witness my hand and seal 3d day of August, 1774." On the 5th January, 1775, Jesse Bruton assigned this bond, in the usual manner, to Messrs. Hamilton & Co.

The suit was tried in the Superior Court of Law for Halifax district, at April Term, 1802. The jury found the value of the money mentioned in the bond to be £1020 15s. and assessed damages for the detention of the debt to £48 9 7. The plaintiffs being dissatisfied with the verdict, moved for a new trial; and the case was referred to this court.

Macay, J. This appears to me to be a proper case for a jury to ascertain the value of the bond, who may have all the circumstances relating thereto laid before them.

Johnston, J. This was a bond executed in 1774, to secure the payment of fifteen hundred pounds, proclamation money, at five equal payments, commencing on the third day of August, 1775, and ending in August, 1779. At the time the contract was made, and the two first payments became due, the proclamation money had not depreciated; but that currency, and all other paper money, had greatly depreciated before the last payment became due. The jury in their verdict gave the plaintiffs only so much, as the nominal

sums were worth on the days they became payable; whereas the plaintiffs contend, they should have given the value of the nominal sums, as it was at the time when the contract was entered into. When a person enters into an obligation in writing, attended with the legal ceremony of sealing and delivery, the law presumes without other evidence, that he has received a consideration, equal in value to the sum he obliges himself to pay, if, therefore, the jury give a less sum than that, which the parties themselves had in contemplation, at the time when they entered into the contract, the plaintiff does not receive a compensation adequate to the value of the property transferred to the defendant at the time; thus the defendant obtains an advantage and the plaintiff sustains a loss, which neither of them had in contemplation, at the time when the contract was entered into: therefore, in order that the plaintiffs should have the real benefit of their contract, according to the intention of the parties, if they take the subject under their consideration, should find what was the value of proclamation money in the present currency, agreeable to their relative value to specie respectively. I am therefore of opinion that the new trial be allowed.

TAYLOR and HALL, Judges, were of opinion that a new trial ought to be granted.

NOTE.—See *Hamilton* v. *Person*, 2 Hay. Rep., 236; *McNair* v. *Ragland*, 1 Dev. Eq. Rep., 516.

SMOOT & THOMPSON v. WRIGHT'S ADM'RS.—Page 374.

An executor cannot plead that he has fully administered since the last continuance; as every plea of fully administered must have reference to the commencement of the action, or at least to the time of process served.

The defendant pleaded that he had fully administered

since the last continuance, to which there was a demurrer and joinder.

By the Court. A plea since the last continuance is to set forth matter which has happened pending the suit, and after having pleaded to the action at a former term; and though there are some pleas which an executor or administrator may plead after the last continuance; yet we know of no instance where this plea could be admitted; for if it should be found for the defendant that he had fully administered *since the last continuance*, it ought not to bar the plaintiff of his recovery. In order to bar the plaintiff, it must be pleaded and shewn that the defendant had fully administered before the commencement of the action, or at least before any process served on him. We are therefore of opinion that judgment should be entered for the plaintiffs on the demurrer.

NOTE.--See *Woolford* v. *Simpson*, 2 Hay. Rep., 132, and the cases referred to in the note.

JACOB WELLS v. LEVI NEWBOLT.—Page 375.

If a tenant in tail aliens in fee and dies, leaving the issue in tail free from any of the disabilities mentioned in the statute of limitations, and such issue neglects to enter or make claim for seven years after the death of his ancestor he and his issue will be forever barred.

This was an action of ejectment in Wilmington Superior Court. At the trial in May Term, 1802, the jury found a special verdict in substance as follows, to-wit:

"The jury find that the land in question was granted to William Wells in the year 1735; who some years afterwards, by his last will and testament devised the same to his two sons Joseph and Henry, in the following manner, viz.: I give and devise the plantation whereon I live,

to my two sons Joseph and Henry, and their heirs lawfully begotten of their bodies forever; to be divided, each of them to have one half of the wood land and one half of the cleared ground; and in want of heirs of either of them, then the whole to go to the survivor or his heirs, and in failure of both of their heirs, then to my right heirs for ever," and died in the year 1743. Henry died under age and without issue in 1749. Joseph, who survived Henry, by deed of bargain and sale, bearing date the 3d day of February, 1761, for a valuable consideration, conveyed the land in question, to Stephen Lee and his heirs forever. The operative words in the deed are "give, grant, bargain, sell, alien, enfeoff, convey and confirm," with a covenant or warranty in the words following, to-wit: "And furthermore, I the said Joseph Wells, for myself, my heirs, executors and administrators, do covenant, grant, promise, engage and agree to and with the said Stephen Lee, his heirs, executors, administrators and assigns, the above bargained land and premises, together with all the privileges and appurtences thereunto belonging, forever herefter, to warrant and defend against the lawful claim or demand of all manner of persons whatever." Stephen Lee and those claiming under him have been in possessesion of the land ever since. Joseph Wells died in the year, 1787, leaving issue David his eldest son, William his second son, and two daughters. David Wells died in 1798, leaving issue Jason the lessor of the plaintiff, Joseph and Elizabeth. Upon these facts the jury doubt, and pray the opinion of the court."

Gaston for the defendant. The first object of enquiry appears to be, what estate Joseph Wells had in the land contended for, at the time of his conveyance to Stephen Lee. Should it appear that he was seised in fee thereof, it will follow that having absolutely disposed of all his interest, the present plaintiff can claim nothing by descent from him. If, on the contrary Joseph Wells was merely tenant in tail, it will then be necessary to examine whether the entry of the issue has been taken away.

1. The defendant contends that Joseph Wells was seised in fee. The words of the devise are, "To my two sons, Joseph and Henry, and their heirs lawfully begotten of their bodies forever, to be divided; each of them to have one half of the cleared ground, and each of them one half of the wood land; and in want of heirs of either of them, then the whole to go to the survivor or his heirs, and on failure of both their heirs, then to my right heirs forever." It is admitted that by the former part of this devise, estates tail are granted to Joseph and Henry, and that the words "in want of heirs of either of them" are to be construed as if they were "in want of heirs of the body of either of them;" because it is impossible that either of them should die without heirs as long as the other survived. *Webb* v. *Herring*, Cro. Jas., 416. But it is contended that the subsequent words, "and in want of heirs of either of them, then the whole to go to the survivor or his heirs," did, upon the death of Henry without issue, in the life-time of Joseph, vest in him (Joseph) an absolute estate in fee. The very definition of an estate in fee simple is, where lands are given to a man and his heirs, generally and simply, without specifying what heirs, but referring that to his own pleasure or to the disposition of the law. This is plainly the case here "the whole to go to the survivor or his heirs,"—not heirs male nor heirs female, nor heirs of his body, but heirs, generally. The last words of the devise "and in failure of both their heirs, then to my right heirs forever," cannot, under the authority of the rule laid down in *Webb* v. *Herring*, before referred to, and in the other cases reported in the books on the same head, be considered as confining the meaning of the word heirs just before used, to that of heirs of the body; because it is not impossible that the sons should die entirely without heirs, while there were heirs remaining of the father. The heirs of the father are not necessarily the heirs of the son, as the father may have children by different venters, who cannot inherit from each other. It is therefore believed that, under the devise, each son was tenant in tail of the part to him devised, with remain-

der in the whole to the survivor in fee, and that the subsequent limitation over to the right heirs of the devisor is void, it being a limitation of a fee upon a fee.

2. If however it should be thought that Joseph Wells was but tenant in tail at the time of his conveyance to Stephen Lee, it is then contended that, by that conveyance, a discontinuance was made, which took away the right of entry of the issue in tail, and that an ejectment cannot be supported.

No position appears to be laid down in our law with more clearness or more force than that an ejectment will not lie, except the lessor of the plaintiff have in him a right of entry. Runningten on Ejectments, pages 10 and 11; 3 Black. Comm., 206; 3 Woodeson, 44 and 45.

Lord Coke defines a discontinuance, Co. Litt., 325. *a*, to be "an alienation made or suffered by tenant in tail, or by any that is seized in *auter droit*, whereby the issue in tail, of the heir, or successor, or those in reversion or remainder, are driven to their action, and cannot enter." Estates tail are known to have originated from what were termed at common law "fees conditional." These were fees limited and restrained to some particular heir exclusive of others, as to the heirs of a man's body, by which only his lineal descendants were admitteed, in exclusion of collateral heirs. A gift thus made, to a man and the heirs of his body, was considered as a gift on condition, that the thing given should revert to the donor, if the donee had no heirs of his body, but if he had, that it should remain to the donee. As soon as the donee had issue, his estate became to most purposes, absolute. He could alien the land, and thereby bar his issue, and also him in reversion. The nobility of England, anxious to perpetuate their possessions in their families, procured the statute "*de donis conditionalibus*," (13, Edw., 1.) to be made, by which it was enacted that from henceforth in such gift the will of the donor should be observed, and that the lands so given should at all events go to the issue, if there were any, or if none, should revert to the donor. Upon the construction of this statute it was determined that an estate of

inheritance still remained in the donor: this got the name of an estate tail. Innumerable inconveniences attended estates tail. Some of them are stated with great force and elegance by Justice Blackstone in his Commentaries. Children grew disobedient—farmers were ousted of their leases made by tenants in tail—creditors were defrauded of their debts—latent entails were produced to deprive purchasers of the lands they had fairly bought—and treasons became frequent. They were justly branded as the source of new contentions and mischiefs unknown to the common law, and almost universally considered as the common grievances of the realm. In Anthony Mildmay's case, reported 6 Co. Rep., 40, it was resolved by the Judges, that "these perpetuities," so they style them, "were against the reason and policy of the common law." In Mary Portington's case, 10. Rep., 42, it was observed "that these perpetuities were born under some unfortunate constellation," and similar expressions are frequently met with in the ancient reporters. It is not therefere to be wondered at, that various artifices were used to elude these new restraints upon property. One of these was carried into effect through the medium of a discontinuance. This cannot perhaps be better explained than by using the language of the eminent conveyancer and lawyer, Mr. Butler, in one of his Annotations on Coke Litt., 15 edit. Hargrave and Butler's Co. Litt., 191, *a*, note 77, *v.* 8. "It has been observed that through the statute *de donis* took away the power of lawful alienation, it did not suspend the vesting of the fee. The alienation, therefore, of the donee, tenant in tail, was no forfeiture; and the alienee, as he took his conveyance from a person seized of the fee, was considered as coming in under a lawful transfer of the inheritance. Now it was an established rule of law, that whenever any person acquired a presumptive right of possession, his possession was not to be defeated by entry. The consequence of this was, that in these cases the alienation was unimpeachable during the life of the alienor, and after his decease, the heir could not assert his title by the summary process of entry, but was driven to the expensive and dilatory process of a formedon:

this was termed a discontinuance. The expense and delay attending a formedon, frequently prevented the tenant in tail from resorting to it to assert his right. In the course of time the period for asserting it elapsed, and thus therefore, virtually, the discontinuance proved a bar to the entail." It was not however by every mode of conveyance that a tenant in tail could operate a discontinuance. No conveyance but such as took effect by way of transmutation of the possession, or such as on account of the particular solemnities attending them were deemed sufficient to disturb the original seisin, could of themselves work a discontinuance. Thus Litt., sec. 598, page of Coke, 328, *a*, tells us, "if tenant in tail be disseised, and he release by his deed to the disseisor and to his heirs all the right which he hath in the same tenements, this is no discontinuance; because a release passeth nothing but the right which may lawfully be released, without hurt or damage to others; and therefore nothing of the right could here pass to the disseisor, but for term of the life of tenant in tail, who made the release." Neither will a conveyance that takes effect by the statute of uses operate a discontinuance, where the possession remains with the party; for in such cases the original seisin is not disturbed: there is no transmutation of possession—a mere bargain and sale, it is conceded, cannot operate a discontinuance. A feoffment certainly may. Thus Litt., sec. 595, page of Coke, 326, *b*. "If tenant in tail of certain land, thereof enfeoff another, &c., and hath issue and dieth, his issue may not enter into the land, albeit he hath title and right to this, but is put to his action, which is called a formedon *en le descender*." The conveyance referred to in the special verdict, and made a part of it, must be considered either as a feoffment, or as a bargain and sale. Why should it not be considered as a feoffment?

A feoffment is defined by Justice Blackstone, 3 Comm., 314, "the gift of any corporeal hereditament to another." The apt words whereby to make it, are "give, grant, enfeoff." To complete and perfect the feoffment, the feoffor used to give the feoffee seisin of the land; what the

feudists called investiture. This was done by the ceremony called livery of seisin, which ceremony was held necessary to complete the donation. Had this ceremony been used at the time of making the conveyance, which we are now considering, that conveyance would undoubtedly have operated as a feoffment. It was an immediate gift of the inheritance. It has the technical and proper words "give, grant, enfeoff." It was intended to operate on the possession as well as the right, the possession being here conveyed and the use limited to one and the same person. But our act of 1715, cap. 38, sec. 5, 23, directs that all conveyances of land proved and registered as by that act directed, "shall be valid and pass estates in land without livery of seisin, attornment, or other ceremony whatsoever." The necessity, therefore, of livery of seisin to perfect a feoffment, is taken away by this act. The notoriety occasioned by a registration of the conveyance in the county where the land lieth, is adopted by the act as a substitute for the notoriety arising from the actual tradition of possession. This conveyance therefore, having been duly proved and registered, should have the same effect as if livery of seisin had been made with it. It must then operate as a feoffment. Let it be remembered that the rule of law is, "that where conveyances may operate both by the common law and the statute of uses, they shall be considered as operating by the common law, unless the intention of the parties appears to the contrary." See Hargrave and Butler, Co. Litt., 271, *b*, note, 231, III, 3, explaining the conveyance by lease and release.

But admitting the conveyance to be a bargain and sale, yet the warranty annexed to it works a discontinuance. Thus Littleton, sec. 601, *p.* 327, *b.*, observes that "if the tenant in tail release to his disseizor, and bind him and his heirs to warranty, and dieth, and his warranty descend to his issue, this is a discontinuance by reason of the warranty." For which Lord Coke immediately gives as a reason, "if the issue in tail should enter, the warranty, which is so much favoured in law, would be destroyed." In note 284, to 330, *a*, of Co. Litt., it is also stated that although a

bargain and sale, &c., &c., will not of themselves work a discontinuance, yet "if a warranty is annexed to a bargain and sale, &c., it may produce a discontinuance."

Here is a warranty. The words are "I the said Joseph Wells, for myself, my heirs, executors and administrators, do covenant, grant, promise, engage and agree to and with the said Stephen Lee, his heirs, executors, administrators and assigns, the above bargained land and premises, together with all the privileges, &c., &c., forever hereafter do warrant and defend against the lawful claim or demand of all manner of persons whatever." If, instead of *do* warrant, the phrase of *to* warrant had been used, there would be much force in the observation made by one of the counsel for the plaintiff, that this is not an actual warranty, but merely a covenant to warrant. The expression is *do* warrant. The conjunction *and*, perhaps, should have been inserted, and then then the intention of the parties would have clearly appeared. There would be then both a warranty to bar the issue, and a covenant to indemnify and secure, which would bind executors. But without the insertion of the conjunction, if surplusage be rejected, there remains a clear warranty. If there be any ambiguity, the deed is to be taken most favorably for the grantee, and most strongly against the grantor.

Perhaps it will be said on the part of the plaintiff, that although there be a discontinuance which takes away the right of entry, and although an ejectment cannot (as has been shewn) be brought but by him who has a right of entry agreeably to the general principles of law, yet that as actions of formedon have never been in use in this country, and only such parts of the common law and such statutes as were in force and in use here before the revolution, are declared by our Legislature to be in full force now within this State; if the lessor of the plaintiff have but a right of property, that will be sufficient to support an ejectment. To this it is answered, that admitting that actions of fermedon cannot be brought, it is the province of the Legislature and not of the courts to alter (if deemed necessary) the established principlos of law; and that, if the courts could Legislate on this subject, they would not

do so in support of entails, which are so strongly reprobated by our constitution and bill of rights. [See bill of rights, sec. 23, and const., sec. 43.] But it is denied that actions of formedon may not be brought. Such actions are expressly taken notice of and jurisdiction of them given to certain courts and witheld from others. See act of 1777, cap. 2, sec. 61, page 310, and act of 1785, cap. 2, sec. 1, page 547.

3. It is denied by the defendant that the plaintiff has in him even a right of proporty, which would enable him to support any action; and it is insisted that the absolute title to the premises in dispute, is in the heir of Stephen Lee, although Joseph Wells had but an estate tail when he conveyed to said Lee.

Let it be admitted that this conveyance passed a title *prima facie* good, yet defeasible upon the death of Joseph; defeasible, if not by entry, by suit. If it has not been defeated within the time prescribed by our act of 1715, for quieting men's estates and avoiding suits in law, it has become absolute and indefeasible. Examine the 2d sec. of that act and it will be seen that this case is one to which it applies. "All possessions of or titles to any lands, &c., &c., derived from any sales made either by creditor, executors or administrators of any person deceased, or by husbands and their wives, or by husbands in right of their wives or by indorsement of patents or otherwise, of which the purchaser or possessor, or any claiming under them, have continued or shall continue in possession of the same for the space seven years without any suit in law, be, and are hereby ratified, confirmed and declared good and legal, to all intents and purposes whatsoever, against all and all manner of persons: any former or other title, or claim, &c., &c., to the contrary notwithstanding."

It would not have been easy to find language more strong, more comprehensive than the Legislature have used. This is a title dervived under a sale, and the purchaser has continued in possession more than seven years without suit at law, while there were persons in being entitled to bring suit, and

who did not come under any of the exceptions afterwards mentioned, who were not infants, femes covert, *non compotes*, imprisoned, or beyond seas. This title therefore, thus derived, is, in the words of the act, good and legal, to all intents and purposes, against all and all manner of persons.

It may be contended on the part of the plaintiff, that the above recited clause was intended to operate only on sales that had been made previously to the act. But no evidence of such an intention is to be found in the act itself. The participle "deprived" is used generally, and is as susceptible of a future as of a past signification. No auxiliary is prefixed to it to limit its time. It might with equal propriety have been subjoined to the verb *to be*, used in the future, as in the past tense. If the Legislature had intended that this clause should operate only on titles that *had been* derived, it is presumable they would have so expressed themselves. If they had meant it to have effect only on such titles only as should *thereafter* be derived, it would have been equally easy to declare such intention in plain and precise words. Having used the word indefinitely, it is conceived they had in view both description of cases. But should such a construction be put on *this* clause as the plaintiff will probably contend for, such a construction as will prevent its application to the present case, it is nevertheless firmly believed that the subsequent clauses of the act, the third and the fourth, will be sufficient for the defendant's purpose. Before our act of 1715, there were times of limitations settled, beyond which no man, either in an action to establish the right or to recover the possession, could avail himself of the seisin of himself or his ancestors, or take advantage of the wrongful possession of his adversary. By the stat. of 32, Henry 8, cap. 2, sixty years were made a limitation to a writ of right, and fifty years (in general) to an assize and writ of entry. By the stat. 21, James 1, cap. 16, twenty years were fixed as a limitation to entries and ejectments, and to actions of formedon. The works of this last mentioned statute as to formedons are strong and pointed. "All writs of formedon *in descender*, &c., &c., of any man-

ors, &c., &c., at any time hereafter to be sued or brought, by occasion or means of any title or cause hereafter happening, shall be sued and taken within twenty years next after the title and cause of action first descended or fallen, and at no time after the said twenty years." By this statute, if any action of formedon was not brought within twenty years after the right to such an action had *first* descended, that is (as in our case) after the death of the tenant in tail who discontinued, such an action could never afterwards be brought, neither by the immediate issue who permitted the twenty years to elapse, nor by the issue of that issue. The statute does not distinguish between them. It would indeed have been idle to have called it a statute for avoiding suits in law, if it had permitted the subsequent issue in tail at any indefinite period of time to have brought an action of formedon, provided twenty years had not elapsed since *his* alleged title had descended. Were this the case, the discontinuee and his heirs might enjoy the lands purchased for centuries, and yet be liable on the death of every heir of the body of the first tenant in tail to be evicted by his successor. That the construction contended for by the defendant is correct will appear pretty evidently from the comment of Lord Coke on the statute, 22, H. 1, and the note thereon. Co. Litt., 115 *a*, and note. Twenty years are also the limitation to entries by this statute. Our act of 1715, by its third and fourth cases, makes seven years a limitation to all actions respecting land, by declaring that no person shall either "enter or make claim" but within that period after the right to entry or claim accrues; and by declaring further that, with certain exceptions as to infants, &c., a possession of 7 years without entry or suit in law shall be a perpetual bar against all and all manner of persons whatsoever, "that the expectation of heirs may not in a short time leave much land unpossessed, and titles so perplexed that no one will know of whom to take or to buy lands." Joseph Wells, it will appear from the special verdict, died in 1787. David, his eldest son, lived till 1798; Stephen Lee, and those

claiming under him being in actual possession of the premises during the whole period.

4. The defendant also urges that his right to the possession of the premises is completely established, if it should fail on the preceding grounds, by the act of 1784, cap. 22. If that act converted the estate tail (admitting for the moment that such it was) into a fee simple, the plaintiff is undoubtedly barred by the act of limitation.

The clause of the act which is believed to have this effect, is the fifth. This clause, reciting that "Entails of estates tend only to raise the wealth and importance of particular families and individuals, giving them an undue influence in a republic, and that they prove in many instances the sources of great contention and injustice," enacts, "That from and after the ratification of the act, any person seised or possessed of an estate in general or special tail, whether by purchase or descent, shall be held and deemed to be possessed of the same in fee simple, fully and absolutely, without any condition or limitation whatsoever to him, his heirs and assigns forever, and shall have full power and authority to sell and devise the same as he shall think proper, and such estate shall descend under the same rules as other estates in fee simple;" and it further ratifies and makes valid all sales made by tenants in tail, in actual possession since the first day of January, 1777. This act undoubtedly is entitled to the most liberal construction, since it is made in consequence of a constitutional injunction. Its title is, "to do away entails." The words seised or possessed, in the former part of the clause, should not be confined to mean actually possessed; for in the latter part of the clause the words actually possessed are made use of: The expression would not have thus varied if the meaning remained the same. It is therefore conceived that the entail of the lands sued for was broken by the act of 1784.

The sons of Joseph Wells were entitled, on his death to a fee simple therein, and as they did not prosecute their claim within the period assigned by law, all deriving title under them are forever barred. A construction similar to

this has been, it is said, put upon this act by the Federal Circuit Court of this State in the case of Harrison and Gilmour.

Thus therefore the defendant insists,

1. That Joseph Wells was seised in fee at the time of his conveyance to Stephen Lee.

2. If he were seised in tail, that this conveyance worked a discontinuance which has taken away the right of entry, without which an ejectment cannot be supported.

3. That seven years possession since the death of Joseph Wells had under the act of 1715, perfected and completed the title of Stephen Lee.

4. That the estate tail was broken by the act of 1784, and claim not having been made within the time prescribed in our act of limitations, the sons of Joseph Wells and all claiming under them are forever barred.

Should any one of these points be determined in favour of the defendant, the plaintiff cannot have a judgment. If all the grounds of defence taken should fail, it is submitted whether the plaintiff can recover but a ninth part of the lands sued for. Joseph Wells died since the act of 1784, leaving three sons. David, the eldest son, died since the act of 1795, leaving issue, besides the plaintiff, a son and a daughter. The act of 1784, regulating descents, directs that all the sons should inherit equally, and the act of 1795 places the daughters on the same footing with the sons.

Haywood, for the plaintiff. This case is not within the act of 1784; it is to be decided by the law prior to that act, and as if that act had never been made.

The act provides for two cases. One where tenant in tail is found in possession at or after the act; his estate tail is converted into a fee; if he is not in possession, but has a right to it only, that right is not impaired, nor his remedy to recover it abridged. As the object of the act was to do away perpetuities, it was not necessary to this end, that rights of entry of tenant in tail, should be destroyed, nor the defeasible estate of a wrongful possessor should be rendered indefeasible at the expense of tenant in tail out of posses-

sion. For the estate, when recovered and reduced into possession, instantly becomes a fee by the operation of the act, and the perpetuity as completely done away as it could be by annulling rights of entry; and moreover the invasion of the right of property is avoided; the words seised, or possessed, &c., were purposely inserted, to exclude the idea of intermeddling with rights of entry or of action.

The other case provided for, is that of a solely tenant in tail after the first day of January, 1777, evincing a clear intent not to interfere with alienations made before that period, and to leave them as they were under the regulation of the laws in being. The case before us falls under neither of those branches of the act, and is in no wise affected by it.

What then was the law as it regards this case before and at the passing of the act of 1784? It was, that a conveyance by tenant in tail made by bargain and sale, release, covenant to stand seised, or other conveyance not operating by way of feoffment, passed no more to the bargainee, than the bargainor could lawfully convey: a base fee determined by the entry of issue in tail and consequently by his ejectment. Lit., sec. 606, 607, 609, 610; 2 Ld. Raymond, 778; 3 Burrow, 1703. Lee's estate was of this kind, and was defeasible by entry or ejectment of the issue in tail, and is so at this time, unless the right of possession of the issue has been destroyed by some of the means adverted to, in the objections raised against his recovery. These shall now be considered and be attempted to be removed.

The first objection is, that the estate of the surviving devisee, which came to him on the death of his brother, was not an estate tail, but an estate in fee and well conveyed to Lee. Answer: supposing this to be so, he had still an estate tail in his own moiety, and we are entitled to recover that, though the objection be valid; but it is not valid; the limitation, if I recollect it, is "if the survivor die without heirs, then to the right heirs of devisor." Now it is a rule, that whenever an estate is limited to the right heirs of the devisor by will, and the quality of the estate is not altered by the devise, the right heirs take by descent, as well that

they may be liable to the specialty debts of the ancestor, as to the feudal duties owing to the lord. Then the estate contained in this limitation came by descent, immediately on the death of the devisor, to one of these devisees; for it is not stated, and therefore cannot be assumed, that he had any other sons: On the death of the last son, it descended on some one, who was both the heir of the son and of the devisor; it was impossible, therefore, that the survivor could die without heirs general, so long as there were heirs of the devisor, who necessarily were his heirs also to take and consequently the dying without heirs, here spoken of, must have been intended heirs of the body, and create an estate tail. Cowp., 234; 1 P. W., 23; Salk., 233, pl. 12. The defendant cannot say, the devisor might have an elder son by another venter, who was the heir of the devisor, and not the heir of the surviving devisee: No such fact is found by the verdict, and we cannot travel out of it; nor was any such fact proved on the trial, were we allowed to travel out of it. In the case cited from Salk, and P. W. it was taken that A. was the heir of the devisor, and the brother of the whole blood to B., it is not being found otherwise; so here, there is no finding that the devisees were not of the whole blood, nor that there was any son of the devisor, who was his heir and not the heir of the devisees, in case of their deaths without children. Therefore, on the death of the survivor, the estate limited to the right heirs of the devisor, must have gone to the eldest son of the survivor; or had he died without children, to the uncle on the father's side, being precisely the same persons who are heirs of the survivor, and also heirs of the devisor, and then, the limitation of the estate, to the survivor, on the death of his brother, and for want of heirs of the survivor, over is the limitation of an estate tail; Fearne, 4 ed., 350, 351.

Again, the intent of the devisor is plain that the survivor on the death of his brother, shall have an estate descendible to his heirs, but at the same time such an estate, as leaves another estate for the heirs of the devisor; and this is the very description of an estate tail. There is no way to get

over considering it as such, but by supposing the devisor had an elder son by another venter; but, for the reasons already given, no such supposition should be made. If it can legally be made, the cases from Salk. & P. W. are not law, for in these, there was as much room for such supposition, as here; there was no finding in these cases, that there was not an elder son of the half blood. The survivor, then, of these devisees, was seized of an estate tail in both moities, with the reversion in fee to himself by descent.

Another objection is, that a feoffment in fee by tenant in tail, works a discontinuance, and that the deed to Lee is a feoffment. The law, as stated, is not denied; but it is denied, that this deed is a feoffment. The deed agrees in every part of its description, with that of a bargain and sale, which is, "a contract in consideration of money, passing an estate in lands, by deed indented and registered." 1 Ba. Ab., 273. The words alien, grant, enfeoff, are as proper for a deed of bargain and sale, as the words bargain and sell. Sanders, 345; 8 Rep., 93, b, 94, a; 3 Leonard, 16, pl. 39. Should the word "enfeoff," therefore, be found in this deed, no just inference can thence be drawn in favor of the objection; the same argument would convert almost every deed into a feoffment, for it is very general, and in almost all deeds. We should look well to the consequences of such an opinion before it be adopted. What is a feoffment? The definition of it is, "a conveyance by delivering possession upon or within view of the land conveyed." Sanders, 206. A deed forms no part of the conveyance, though it may accompany the feoffment, and is of use to evidence the quantity of estate conveyed; 2 Ba. Ab., 483; still however, if the deed expresses an estate in fee, and the feoffor deliver seisin for life, the feoffee can hold but for life; Litt., sec. 359. Co. Litt., 222, b, for the estate passes by the livery, and not by the deed. There was no livery; whatever estate passed, passed by the deed; it was not a conveyance by feoffment, for nothing can constitute a feoffment but livery and seisin. It is argued, however, that the act of 1715, cap. 38, sec. 5, allows of a feoffment without livery and seisin; if this be

so, the act has changed the nature and description of a feoffment, and has made a deed to be a feoffment, which, before, it could not be. The words which are supposed to have worked this alteration are "all deeds registered, shall pass estates in lands without livery of siesin, attornment or other ceremony." Does it follow that because livery and seisin, or feoffment, (for these terms are synonymous) are rendered unnecessary or unessential to the passing of estates in lands, that, therefore, deeds conveying estates, shall be deemed feoffments? Certainly no, dispensing with livery and seisin, is dispensing with feoffment. If a man chuses to convey by feoffment, he may: but then, he must perform all the ceremonies which are requisite to constitute a feoffment; otherwise it will not be a conveyance by feoffment since the act, any more than before.

Admit, however, that the nature of a feoffment is changed by the act from what it was, and that some ceremonies are now omitted, which were formerly essential; the consequences and the effects of the omitted ceremonies will cease with them, *causa cessante, cessat effectus.* Then it follows, that the discontinuance, being the effect of livery and seisin, ceases with it. Wherefore is it, that a discontinuance is operated by the feoffment of tenant in tail? It is because tenant in tail, having the inheritance, and the possession of the inheritance, not a possession for life only, coextensive with the quantum of interest in the estate, and transferring it by livery, not only passes the possession for his life, which he lawfully may transfer but also the possession of the inheritance, which belongs to the issue and which he ought not to transfer: and so leave no right of possession which can descend to the issue, but a right of property and of action to recover it; which is a discontinuance. Gilb. on Tenures, 108, 109. It is the actual transfer of the possession which produces this effect; and accordingly, if he passes the estate by deed, for instance, a bargain and sale or release, which latter is a conveyance of the common law, that passes no more than he lawfully may pass, namely, a possession for the life of the grantor, leavign a right of possession

to descend to the issue, and works no discontinuance; Litt., sec. 598, 599, 600, 601.

If then livery and seisin, be the cause of the discontinuance, where tenant in tail conveys by feoffment, where he conveys by deed called a feoffment without livery of seisin, there will be no discontinuance, unless the urgument goes further, and proves that the act meant to impart to this deed, called a feoffment, all the properties of a true and proper feoffment. That cannot be maintained, for the act gives to the deed registered, the property of passing the *estate* in the land; not to the actual possession of it. What is this estate, which the deed passes? No more than the interest or estate which the grantor may lawfully pass. It surely was not the intent of the act, to make the deed pass a tortious estate, like the feoffment, whereby tenant for life, or other inferior estates, may pass a fee, and displace remainders and reversions, and turn them to a right, unless entry be made in the lifetime of the alience, who may, from the secrecy of the conveyance, not be apprised immediatety of the deed. Considering the deed as a feoffment to all purposes, will draw after it these consequences; and what then is become of the estates of remaindermen and reversioners placed in this situation? There is no remedy in this country but the ejectment; the benefit of this will be lost to them.

Another objection is, that a deed of bargain and sale with warranty, works a discontinuance; and if this is not a feoffment, it is a deed of bargain and sale, with warranty; the law is admitted, but here is no warranty at all.

"A warranty is a covenant real, annexed to lands or tenements, whereby a man and his heirs are bound to warrant the same, and either upon voucher, or by a judgment upon a writ of *warrantia chartæ* to render other lands to the value of those that shall be evicted by a former title, or may be used by way of rebutter." Co. Litt., 365, a.

In our case the covenant is not annexed to lands; for if the grantee be evicted and die, his executors must sue upon it. Bul. N. P., 158; 2 Levinz, 26, 62. An action of covenant is the proper remedy, not a *warrantia chartæ;* it is a cove-

nant binding his executors and administrators, for they are expressly named in it: a warrranty cannot affect executors and administrators, but the heirs of the warrantor only. When the executors or administrators shall be sued, the recovery will be in money, not in lands; for they have no lands of equal value to give. No one will deny but that if the grantee be evicted, the executors of the grantor and his personal estate, are liable to retribute the lessee; then it cannot be a warranty, but a covenant for warranty, or to warrant, like that stated in 1 Vessey, 516; 2 Bl. Com., 304. Had the expression been "I covenant to warrant," there could have been no doubt. "I covenant for my heirs, executors, &c., the land, &c., do warrant," amounts to the same thing; the warranty in both instances, is placed in the infinitive mood; turn it into Latin, it is *convenio me warrantizare*. If both the covenant and the warranty be placed in the indicative mood, some part must be rejected, to make sense of the rest: If we reject that part of the covenant which is personal, "I covenant for myself, my heirs, executors, &c., do warrant," there will indeed be a warranty, but not one that answers the purpose of the defendant; for the heirs of the warrantor are not named. Co. Litt., 383, b., 384, b., the warranty expired with the life of the warrantor, and never descended upon the heirs, so as to create a discontinuance.

If it be argued, that the words are to be taken most favorably for the grantee, the answer is, a personal covenant, binding both executors and heirs, both the real and personal estate, is most favorable for him; 2 Bl. C., 304, and no doubt such was the intent of the parties. This was an estate tail, liable to be reclaimed; it was proper that the grantee should have the highest possible security, and are sort both to real and personal estate of the grantor; for what would have been his situation, if the grantor had no real estate, but personal enough at the time of eviction? The grantee, if this were a mere warranty, could have no recompense at all.

But say, here is a warranty annexed to the lands, and binding on the heirs of the warrantor; what then is the result? On the death of the surviving brother, after 1784, it

descends on his heirs, his three sons; on the death of the elder of those, after 1795, one-third of the warranty descended on his three children, and the lessor of the plaintiff is liable to one-third of that one-third only, Co. Litt., 393; he can only be rebutted for one-ninth part of the premises sued for; the other eight-ninths he is entitled to recover. Warranty always descends to those who are the heirs of the warrantor, by the general law of the country; otherwise it would serve but little purpose for the protection of estates; for then, instead of rebutting the claim of all the heirs of the warrantor, it would rebut the claim of one only; the others might recover, notwithstanding the warranty. For example, the father conveys, and warrants the lands of the grand-father, and dies, leaving ten sons or children; the grand-father dies; the elder son, if warranty descends upon him, only will be rebutted; the other nine may sue, and cannot be rebutted; but if it descends on all, then all are rebutted.

Another and last objection, but much relied on, is the act of limitations, and the lapse of years in the time of the issue of the grantor, after the death of the grantor; which, it is argued, barred that issue, and on his death the issue now plaintiff.

It would be an unaccountable circumstance, if tenant in tail, or the issue in tail, were not allowed to bar his issue by any deed he could execute, nor by any release he could give to the bargainor, however solemnly executed; but could effect the same thing by his laches.

The act of James is, word for word, the same with our act of limitations, except as to the additional words in ours, which will presently be commented on. Under that act, if tenant in tail or issue in tail, be barred of his entry, that will not bar the next issue in tail. Com. Rep., 124; for the words of the act are "no person or persons shall at any time hereafter make an entry unto, &c., but within twenty years next after his right or title which shall first descend or accrue to the same." As the title of the issue first accrues on the

death of his ancester, then, and not before, does the time begin to attach upon him.

It is true, our act has an additional expression: "All possessions held without suing such claim as aforesaid, shall be a perpetual bar against all and all manner of persons." Therefore, says the defendant, the issue in tail shall be barred, for he is directly within the general expression "all and all manner of persons."

A little reflection will demonstrate the incorrectness of this idea. Nothing more can be meant by it, than that all and all manner of persons shall be barred, who, having a right of entry, have not exerted it within the limited time; it were too unreasonable to say, that the party by his neglect should bar any other estate than his own, or should give an indefeasible fee, against all persons entitled after him, as well as against himself. Let us suppose a case: A. is tenant for life, B. the reversioner. A. is ousted and the seven years lapse. B. is as much within the expression, "all and all manner of persons," as the issue in tail is; yet no one will attempt to say, that B. is barred by the laches of A., the tenant for life. No; A's estate is barred then perpetually, and the estate of the possessor is rendered indefeasible to the extent of A's estate that is barred, and no farther. Whatever estate is lost by the neglect of the owner to enter within time, the same estate is acquired by the possessor: for the right of possession of the true owner becoming extinct by the operation of the act, and there being no person who can bring forward a claim of possession to disturb the possessor, his title is secured thereby.

The possessor only acquires an indefeasible fee, when the estate of the owner neglecting to enter, is a fee: In the case put, the owner or tenant for life is perpetually barred, and all and all manner of persons whatsoever, as to that estate which belonged to A. namely an estate for life; so in the case before us, the issue neglecting to enter was perpetually barred, and all and all manner of persons claiming his estate, whether by execution, sale or other purchase; but as in the case put, the tenant for life cannot affect by his laches any other

than his own estate; so neither can the issue in tail who neglected to enter, affect any other than his own estate. And the issue in tail and reversion may enter when his title accrues by the death of the preceding tenant.

The position would be monstrous, that tenant for years, for life, in dower, by the courtesy, might vest an indefeasible fee in the possessor, by not entering within seven years, and bar those behind them forever. A. having no right, might to convey to B., and give him a colour of title, B. enter, and the particular tenant refuse to sue him, till the seven years were expired; and as all and all manner of persons were thereby perpetually barred, and an indefeasible fee vested in B., the reversioner, remainderman, and heir to the estate held by courtesy, could never recover. Yet the meaning attempted to be put upon the words "all and all manner of persons," extends as much to those persons as to the issue in tail. The title of any of them does not accrue till after the death of the precedent temporary owner, and the case of the issue in tail is not distinguishable from any of them; it is impossible that the construction contended for can prevail.

Johnston, J. I am of opinian that this case is not affected by the act of 1784. That act converted no estates tail into estates in fee, but such whereof there was a person "seized and possessed," and confirmed only such alienations in fee as had been made by tenants in tail in possession since the year, 1777. Joseph Wells aliened the land in 1760, and no one has ever been "seized in tail therein from that period to this day." I think this therefore a *casus amissus;* one for which the Legislature has made provision in their act of 1784. I am also of opinion that if the plaintiff is entitled to recover at all, he is entitled to recover the whole of the land contained in the declaration of ejectment: for that the act of 1784 and 1795 regulated the descent of fee simple estates alone, and meddled not with the descent of entails. On all the other points my opinion is favorable to the defendant. I incline to the belief that Joseph Wells was actually seized in fee at the time of his conveyance to Stephen Lee; and that if

he was seized in tail, a discontinuance was operated by the conveyance, which barred the right of entry of his issue. This conveyance I think should be regarded as a feoffment, but if it were viewed as a bargain and sale, there was a warranty annexed, which gave it the same effect as to the operation of a discontinuance. With respect to the statute of limitations, I entertain no doubt but that, as neither entry or claim has been made on Stephen Lee or his heirs, within seven years after the right to defeat his title had first descended (that is within seven years after the death of Joseph Wells,) and as the person then entitled to make such entry, or bring such suit, did not come within any of the exceptions mentioned in the act, the lessor of the plaintiff could not disturb the possession of the defendant. The long possession of Lee and of those claiming under him, is, in the words of the act, "a perprtual bar against all and all manner of persons whatever."

Hall, J. I think that Joseph Wells was seized of an estate tail and not in fee simple, at the time he conveyed the premises in question to Stephen Lee. I also think that that conveyance did not work a discontinuance of the estate tail, because I cons der it to be only a deed of bargain and sale, which of itself would not have that effect, and that there is not contained in it any such warranty as would qualify it to produce that effect. Were these the only points in the case, I should be of opinion that the plaintiff would be entitled to recover, as the reasons and authorities on which this opinion is founded, are fully contained in the arguments of the plaintiff's counsel, I suppose it to be unnecessary here again to repeat them. But there is another point made in the case, f unded on the act of limitations, which as I have thought somewhat more doubtful, I have endeavored to consider more fully; and I think from the best consideration I have been able to give it, that that point should be decided in favour of the defendant. If each of the issue of tenant in tail as they may happen to become entitled to the estate tail, are to be considered as quite distinct persons, and possessing distinct rights, no way dependant one

on the other, then this opinion must be erroneous, because the act gives the right of entry or making claim within seven years next after their right or title shall accrue or descend, and it cannot be said that the right of entry accrues to any one, until the death of the person entitled to the estate tail next before him. This may be more fully illustrated by the case put by Mr Haywood, of the tenant for life and the reversioner, which I think good law, for surely the laches of the tenant for life would not prejudice the right of the reversioner, because their rights are distinct. Mr. Butler in note 281 upon Littleton, section 595, says, amongst other things, " that though the estate of the tenan tin tail as to his right of possession, or rather, as to his beneficial property in the lands, has only a duration for the term of his life, yet in the eye of the law he is considered as seized of an estate of inheritance." In the case of Penyston versus Lyster, Cro. Eliz., 896, it was decided " that if tenant in tail conveys by bargain and sale, and the bargainee levies a fine with proclamations, and five years pass in the life of the bargainor, who dies, this fine shall not bar the issue in tail but he shall have five years after the death of his father, because the father could not enter to avoid the fine, and his issue was the first to whom the right descended. But it is said in the same case, that if tenant in tail had been disseised, and the disseissor had levied a fine, and the tenant in tail had suffered the five years to pass, &c., that shall bind his issue, because the tenant in tail had a right at the time the fine is levied, and therefore the issue was not within the saving. So we see that the issue are not barred in the first case, because the father could not enter against his bargain and sale; but in the latter case they are, because the right of entry was in the father, which he did not avail himself of. The same distinction is taken in Sheppard's Touchstone, page 32 and 33, and the causes there cited, where it is said " if a tenant in tail discontinue in fee, and the discontinuee lavieth a fine with proclamations, and five years do pass, and tenant in tail dieth, in this case his issue shall have five years after the descender to bring his formedon; but if ten-

ant in tail discontinue rendering rent and die, and the issue accept the rent (which doth bar him for his time) and then the discontinuee levieth a fine and dieth; in this case the issue of the issue shall not be barred by the five years after the fine, but shall have five years after the death of the issue. Here it is strongly implied, that if the issue had not accepted the rent, but had suffered five years to pass, his issue would have been barred. To the same effect, see 1 Dy., 3 a., 3 Com., 358 and 9; 3 Coke, 87, and many other books. It may therefore be said if the tenant in tail to whom the right first accrues, does not pursue his right in time, his issue shall be barred; but if lessee for life levy a fine or make a feoffment in fee, and the feoffee doth levy a fine, he in reversion of remainder shall not be bound by the next five years after the fine levied, but shall have five years next after the death of tenant for life. Cro. Car., 156--7; Shep. Touchstone, 32, and the cases there cited. 3 Com., 358--9. Thus we see that in this respect, the rights of the issue in tail cannot be likened to those of a tenant for life and those of a remainderman, &c. But it may be said and truly, that those adjudictions were not made on the statute 21st James I. chap. 16: 'Tis true that is not the case; but in the statute on which they were made, there is a saving to all persons, provided they assert their rtght within a certain time after it accrues; and I merely mention those cases to shew, that if the right first accrued to the tenant in tail, and he did not exercise it in proper time the issue were barred. The time of limitations in a formedon by Sta., 21st Jac., is 20 years; within which space of time after his title accrues, the demandant must bring his action, or else is forever barred. 3 Bl., 192. Now in case twenty years should elapse during the life ot the issue in tail, and that issue dies, I am not aware at present of any adjudged case that would entitle the issue of that issue to his action at any time within twenty years more. The same statutes which it is said our act of limitation so much resembles, gives the right of entry, provided that right is exercised within twenty years, and it appears to me that in case the right of entry is once lost, that right can no more be revived in

any succeeding issue, than can the right to bring a second formedon. With respect to the case of Hunt versus Bowine, in 1 Com. Rep., 124, relied on by plaintiff's counsel, it is to be observed that the right of entry then did not exist until within twenty years before it was made. There was a discontinuance, and the right of entry was thereby taken away; and the right of entry did not exist till the discontinuance ceased, which happened within twenty years before the entry made. If twenty years had elapsed during the life of the issue without entry, after the right of entry accrued and he had died, and the entry of his issue had been held good, then indeed it would have been an authority in point. Joseph Wells, in the present case, had no right of entry, that first attached to David after his death, which happened in 1787; David died in 1798, without having exercised that right, more than seven years after the death of his father: I therefore think judgment should be for the defendant.

MACAY, J. Let judgment be entered for the defendant.

DUNCAN McFARLAND v. HENRY W. HARRINGTON.—Page 407.

A plea in abatement that the declaration was not served on the defendant, must be filed within the first three days of the term, under the act of 1777.

The plaintiff sued out a writ against the defendant, returnable to Fayetteville Superior Court, October term, 1801. The defendant plead in abatement, to-wit: "The said Henry W. Harrington in his proper person comes and pleads, that he has not been served with a copy of the declaration in said suit; therefore he pleads the same in abatement of said suit, and prays the said suit may be abated." This plea was sworn to and filed the 31st day of October, 1801, as appears by the affidavit of the defendant. The plaintiff demurred, and amongst other causes assigned the following one, viz: "The said plea is also insuf-

ficient in this, that the same was not filed within the three first days of the term of this court, to which the writ aforesaid was returnable, as appears by the defendant's own shewing on the face of the said plea.

By the Court. This plea being under the act of Assembly passed in the year 1777, could only be sustained by being filed within the first three days of the term. That being omitted, the cause of demurrer thence arising is sufficient: Therefore, The plea is overruled.

NOTE.—The declaration is not now required to be served on the defendant, but must be filed in the clerk's office, on or before the third day of the term to which the writ is returnable; otherwise the suit shall be dismissed by the court at the costs of the plaintiff.—See 1 Rev. Stat., ch. 31, sec. 62.

HENRY W. HARRINGTON v. DUNCAN McFARLAND.—Page 408.

In penal actions the material facts on which the actions depend must be stated with precision, and therefore, where the declaration only alleged by way of recital, as "whereas the said defendant having," &c., it was held bad.

None of the statutes of jeofails, not even the act of 1790, extends to penal actions.

This case originated in Fayetteville Superior Court, where the plaintiff declared in the following manner:

"Henry William Harrington, who sues as well for the State of North Carolina as for himself, in this behalf, complains of Duncan McFarland, who being in the custody of the sheriff, &c., of a plea that he render to the said State of North Carolina, and to the said Henry William Harrington, who as well, &c., five hundred pounds lawful money of the State of North Carolina, which he owes the said State of North Carolina, and to the said Henry Wm. Harrington, and unjustly detains; for this, that whereas by an act of the General Assembly of the State of North Carolina, passed at

Newbern in the year of our Lord one thousand seven hundred and eighty-five, in the tenth year of the independence of the said State, entitled "An act to amend an act passed at Newbern, in November, one thousand seven hundred and eighty-four, entitled an 'Act to describe and ascertain such persons, who owed allegience to this State, and to impose certain disqualifications on certain persons therein described,' it is enacted by the authority of the same, that every person who at any time since the fourth day of July, one thousand seven hundred and seventy-six, attached himself to or traitorously corresponded with, or in any manner aided or abetted the enemies of this State in prosecuting the late war, shall be incapable of holding or exercising the office of Governor, Counsellor of State, Delegate in Congress, Judge or Justice of the Peace, Member of the General Assembly, or any office of honor, profit or trust, whatsoever, within this State. And it is by the aforesaid act further enacted, that any person of the above description offering himself as a candidate, or consenting to serve as a Member for any county in the General Assembly, or who shall hereafter offer as a candidate for, or accept of or qualify to either of the afore-mentioned offices, or holding either of the said offices, shall presume to continue to exercise the same ten days after being served with an authentic copy of this act, or after the expiration of three months from the ratification hereof, shall forfeit and pay the sum of five hundred pounds current money for every such offence, to be recovered in any court of record within this State, one-half to be applied to the use of the person suing for the same, and the other half to the use of the State. *Provided nevertheles*, that nothing herein contained shall be construed to include any of the good citizens of this State from holding and exercising any of the aforesaid offices, who were under the necessity of receiving protection from the late common enemy, and who after receiving that protection did not stay voluntarily with them, nor took any active part in any manner, by furnishing them willingly with provisions, or bearing arms against the State, or accepting any appointment under the said enemy,

civil or military: And the said unfortunate citizens having only received protection as aforesaid, and having renewed their allegiance to the State in good time are hereby restored to the rights and privilege of citizens, as fully as if they had never received protection from the common enemy as aforesaid, any law to the contrary notwithstanding. And whereas the aforesaid Duncan M'Farland, on the 14th and 15th days of August, in the year of our Lord one thousand eight hundred, at the county of Richmond within the district aforesaid, did offer himself as a candidate to represent the county of Richmond aforesaid in the General Assembly of the said State, and did consent to serve as a member for the said county of Richmond aforesaid in in the General Assembly aforesaid, and did actually serve as a member thereof. And the said Henry Wm. Harrington, who, as well, &c., in fact says, that the offering as a candidate to represent the county of Richmond aforesaid, in the General Assembly aforesaid, and consenting to serve as a member for the county of Richmond aforesaid, and his actually serving as a member thereof in the General Assembly aforesaid, was after the expiration of three months after the ratification of said act. And whereas the said Duncan McFarland *having since* the fourth day of July, A. D. 1776, attached himself to, or traitorously corresponded with, and aided or abetted the enemies of the said State during the late war with Great Britain, he the said Duncan McFarland hath forfeited and become liable to pay the aforesaid sum of five hundred pounds, by reason of which and the force of the said act of the General Assembly, the said Duncan hath become liable to pay the said Henry W. Harrington, who as well, &c., the said sum of five hundred pounds, &c."

The defendant demurred, and stated the following causes of demurrer, viz:

1. That the said declaration does not show in any manner in what court the suit is pending.

2. That the defendant is not therein precisely alleged to be in custody of the Sheriff, or otherwise shewn to be before the Court.

3. That the said declaration is uncertain and insensible, inasmuch as a certain act of Assembly is therein pretended to be recited, and no conclusion drawn therefrom.

4. That a certain act of the General Assembly therein pretended to be recited, or in part recited, and on which action is founded, is untruly recited, and is materially variant as recited in the declaration, from the act itself.

5. That to the material fact on which the action depends, to wit, the defendant's adherence to the enemies of the State during the late war with Great Britian there is neither time nor place alledged; neither is the fact itself alledged precisely, but by the way of recital, viz. "Whereas the said Duncan having since, &c., attached himself, &c."

6. That the said declaration is uncertain in that part thereof which charges the defendant with having offered as a candidate to represent the county of Richmond in the General Assembly, inasmuch as it does not appear how or for what he was a candidate, whether to represent the said county in the Senate or House of Commons.

7. That the said declaration does not charge the defendant with having committed any offence; neither doth it conclude as it ought to do, after charging the offence, with the words "contrary to the form of the statute in such case made and provided."

By the Court. The fifth cause of demurrer must prevail, connected with the additional circumstance that the charge is in the disjunctive, and does not call the defendant to answer any one of the offences specifically, which the act of Assembly enumerates. In penal actions precision in the charge is indespensable, for the same reason that it is required in indictments; and none of the statutes of jeofail, nor even the act of 1790 entends to them.

NOTE.—the act "concerning the amendment of process, pleadings and other proceedings at law," contained in the Revised Statutes, (1 Rev. Stat., ch. 3. sec. 10,) extends to penal actions by express provision.

ARCHIBALD HAMILTON & CO. v. HERBERT HAYNE'S EX'RS.—Page 413.

Lands in Virginia decended are equitable assets, and charge the heirs in this State with the debts of their ancestor due by specialty and binding his heirs; and if the heirs have sold the land and received the value, a decree shall be made against them for the amount.

The complainants filed their bill in the Court of Equity for Halifax district, calling on the defendants to discover, what assets had descended and came to their hands and possession respectively; and to account for the same. The cause was tried by Judge Johnston, at October Term, 1802, who decreed, "that the defendants Spruce Macay and Elizabeth his wife, and Mary Haynes, the heirs of Herbert Haynes, pay to the plaintiffs, the sum of one thousand and fifty-two pounds three shillings, current money, being the amount of assets in their hands, as heirs to the said Herbert, for land situated in Virginia, which descended to them, and was sold by their agent."

The above decree was made, subject to the opinion of this court, on the question, whether lands in Virginia, which descended to the defendants, Elizabeth and Mary, and were sold by them before the commencement of this suit in Equity, ought to be made liable to the payment of the plaintiffs' debt: being due on a bond given by the father and ancestor of the said Elizabeth and Mary, whereby he bound himself and his heirs for the payment of the said debt.

Brown, for complaints. If an heir sold lands descended before any action brought, the money was always assets in equity, Com. Dig. Chancery, 2, G. I; 1 P. W., 777. *Coleman* v. *Winch*. And surely the authorities of Chief Baron Comyns and Lord Macclesfield, ought to be decisive, 3 Term Report, 64.

Even in 1 Vern., 282, the plea was overruled, and it does not appear what afterwards became of a suit. It is like many of Mr. Vernon's cases, but a loose note hastily taken by a gentleman in the full tide of practice, and indiscreetly

published by others after his death. But from the authority of the two distinguished Judges, who, after that period, presided in the two different Courts of Equity in England, we may safely take it, that the rule was fully settled as first above laid down; and it is, perhaps, owing to that circumstance, as well as to the interference of British statutes, that we meet with so little on the subject in the books.

I take it for granted, that no law of Virginia can be shewn barring a creditor of any remedy which before the settlement of that country, he had in England against lands, either in law or equity.

2. The case stated is, from inadvertency, incomplete, in not stating when the lands descended; but the bill charges that Herbert Haynes died (and of course the lands descended) in 1792: this statement is not denied in the answers, and is, I believe, correct, and therefore ought to be considered one of the facts constituting the case; and if so, then an act of the Virginia Legislature passed the 17th day of December, 1789, and printed in the revised code, page 53, decides the question at once, for section 6 is as follows: "*And be it further enacted*, that where any heir-at-law shall be liable to pay the debt of his ancestor in regard of any lands, tenements or hereditaments descending to him, and shall sell, alien or make over the same before any action brought, or process sued out against him, such heir shall be answerable for such debt or debts, in an action or actions of debt, to the value of the said lands so by him sold, aliened or made over, &c."

The bill was properly brought whether the money was equitable or legal assets.

Taylor, Johnston and Hall, J's. The lands in Virginia, which descended to Elizabeth and Mary, the heirs of H. Haynes, were subject to the payment of his debts due by specialty, whereby he bound himself and heirs; and the heirs, having sold the lands and received the value of them, are liable to pay the complainants the amount of the money so received, notwithstanding the sale of the lands took place before the commencement of the action.

We are therefore of opinion, that the decree as pronounced in the District Court is right, and ought to be carried into execution.

ROBERT WADE, Trustee, &c. v. JAMES EDWARDS.—Page 416.

A special property as trustee, derived from the order of a court in Virginia accompanied by possession under the order, is sufficient to maintain detinue for slaves.

Detinue for the recovery of slaves. The record filed in this court states the following case :

Charles Edwards, of the county of Halifax, in the State of Virginia, being possessed of the slaves in question, duly made his last will and testament on the 14th day of March, 1785 ; and thereby bequeathed one-third part of his estate to Letty his wife during her life, the residue of his estate to his children, to be equally divided amongst them, when his son Leonard Edwards should arrive at full age ; and thereof appointed Letty, his wife, executrix, and Thomas Edwards and Samuel Clay, executors.

The testator died in the county of Halifax aforesaid, on the 10th day of February, 1790 ; his will was proved in the court of that county, on the 20th day of June following ; and Letty qualified as executrix thereof, and soon afterwards possessed herself of the personal estate of the testator, and amongst other things, of the slaves in question ; the said Thomas Edwards and Samuel Clay having refused to qualify, or take any part in the management of said estate.

The said Letty, at the time of proving the will, with Robert Wade and others her securities, entered into bond, conditioned to be void, if she should well and truly return an inventory of the estate of the said Charles Edwards, deceased, administer the said estate according to law, make a true and just account of her actings and doings therein, when required ; and deliver and pay the legacies contained in the

will, according to law; which bond was required by, and executed according to, the tenor and effect of an act of the General Assembly of the State of Virginia.

The said Letty on the 10th day of June, 1793, intermarried with Leonard Cheatham, who joined with her in the administration of the said estate.

Robert Wade, the plaintiff, being one of the said securities, became alarmed at the manner in which the said Leonard and Letty were managing the said estate, and to protect himself and the other securities, filed his petition in the court of Halifax county aforesaid, praying relief, according to an act of the General Assembly of that State, in the following words, to-wit: "When securities for executors and administrators conceive themselves in danger of suffering thereby, and petition the court for relief, the court shall summon the executor or administrator, and make such order or decree therein, to relieve and secure the petitioners, by counter security or otherwise, as shall seem just and equitable." And such proceedings were had on the said petition, that the court aforesaid, on the 29th day of April, 1794, (the said Leonard and Letty having failed to give counter security) passed the following order, viz: "It is ordered, therefore, that the said Leonard and Letty his wife, executor, &c., as aforesaid, do deliver the estate of the said Charles Edwards, deceased, into the hands of the said Robert Wade, for his indemnity."

By virtue of this order or decree, the plaintiff was afterwards possessed in this State, of the slaves in question, and remained possessed thereof, until they came to the possession of the defendant, who still detains them from the plaintiff. The slaves were in the State of North Carolina, resident on a plantation of the testator, at the time of his death, and have continued in this State ever since.

Norwood, for the Plaintiff. 1st. Did the authority of the executrix, applied by the probate of the will, her qualification and letters testamentary, in the State of Virginia, so extend to this State as to enable her to prosecute suits here, without obtaining letters testamentary in this State?

2dly. Did that authority devolve on the plaintiff, by the operation of the law of Virginia, and the order made by Halifax County Court, so as to enable him, as trustee, to prosecute suits here in his own name?

3dly. If the plaintiff had no such authority, will this action lie on his own possession (he being responsible to the creditors and legatees) notwithstanding he has named himself trustee?

1. It is a general rule of law, that personal property shall be governed by the laws of that country where the owner is *domiciled*. 4 Term. Rep., 192; Prec. in Chan., 577; 2 Vez., 35; Amb., 25; 1 Hay. Rep., 357. *Willinmson* v. *Smart* and *Kilby*, *ante*.

And, therefore, a will made and proved according to the laws of the country where the testator resided, vests in the executors, a right to all his personal property, wherever found. And the distribution of the property is governed by the same rule. 2 Ba. Ab., 416; 6 Co., 48; Prec. in Chan., 577; Toller, 47; Amb., 25; 2. Vez., 35. It is, however, held by some, that whenever the property is found within a different jurisdiction, the executor must obtain letters testamentary from that jurisdiction, before he can recover the property by suit. But as to this rule, it is to be observed,

1. That the reason assigned for it in England, is merely formal; and founded on the right of jurisdiction only. 2 Ba. Ab., 399; 1 Com. Dig., 369; 1 Haywood's Rep., 357; 2 Vez., 35; Amb., 25.

2. That a new probate of the will is not necessary, the *formal* letters in such cases being founded on the *former probate*, or letters of administration. Amb., 415.

3. That the executor may, without such formal letters, take the property into his possession in any part of the world, if he can obtain it without suit. 2 Atk., 63.

4. That the reason of the rule having never existed in this State, the rule itself has never been received into practice; the courts permitting executors to maintain suits by

virtue of letters obtained in any other country. A reason different from that assigned by the Judges of England, induced our Courts to adopt the rule as to administrators. It is this; they give bond and security for the faithful administration of the assets, and thereby the creditors of this State are secured in the recovery of their debts; otherwise an administrator of another State or Country might collect in the assets here, by an agent, and not pay the debts due to the citizens of the State. But executors do not give bond, and, therefore, the application of the rule would not have the same beneficial effect, and consequently ought not to be applied.

5. The courts of this State are bound by the probate of the will, and the grant of letters testamentary by the court of Halifax county, in Virginia. Fed. Con., art. 4, sec. 1; 1 Laws of Cong., 115.

The constitution must mean something more than that a copy of a sentence of the court of one State, should be evidence of that act of the court in the other States; for a copy of a record had that effect by the common law, before the adoption of the constitution, and I suppose it could not have been intended merely to enforce that common law principle. I therefore contend that the constitution gives to the judicial acts of a court of record of our State, the same force and effect in all the other States, which they have in another court of same State, so far as they evidence a pre-existing right or duty. And, if so, the right and authority of the executrix being given by the will, the effect of the probate and grant of letters testamentary, being only evidence of that right and authority, will extend to this State. But perhaps it will be objected that this argument will operate in favor of administrators as well as executors, and consequently cannot have any weight, as this question, so far as it affects administrators, has been determined. The answer to this objection is easy. An executor derives his authority from the will, which is co-extensive with his right under the will, the probate and letters being evidence only of his right and authority; but

an administrator derives his right and authority from the act of the court only, and consequently they cannot extend beyond the jurisdiction of the court that granted the administration.

Secondly. It was the intention of the law of Virginia to deprive executors of the possession of the assets, and of all their powers, and to vest them in the securities, and make them responsible for the after management of the estate. It must have this operation, or the securities will not be protected against the waste and misconduct of the executors, and the creditors and legatees may be greatly injured. For the executor, if he should be sued, being exonerated from further responsibility by the order of the court, and having no assets in his hands to indemnify him for expenses, would defend *himself* only, by pleading the order of the court and the delivery of the assets in consequence of it, and not the *interest of the estate;* but permit judgment to pass against it, whether the claim was just or unjust; and if unjust, injure the legatees and oppress the securities; and whether just or unjust, subject the creditor to the necessity of bringing another action against the securities. The principal object of the act was, to secure the rights of creditors and legatees, by compelling executors to give security. It ought to have a liberal construction, so as to give it this effect, without subjecting them to any additional trouble, delay or expense; and if my construction prevails, this object will be effected; but if a contrary one should be adopted, the consequences would frequently be injurious to creditors and legatees, and ruinous to the securities. It would certainly be inconvenient and absurd, to give an action against one man, the executor, who has no interest in the event, and who most probably feels some resentment against the security; and to give the sole possession of the assets liable to satisfy the judgment, to another person, the security, and make him responsible for the conduct of the executor. I have always understood that the courts in Virginia have given this act the construction which I contend for; and believe that this plaintiff has prosecuted suits in his own name as trustee, in the State of Virginia, with effect.

The authority of the security, who by the order is converted into a trustee, must be as great, and as extensive, as the executors, before the order was made; in fact, the security must be substituted in the place of the executor, or the objects of the act would almost entirely fail. For if the authority of the trustee should be confined to Virginia, the executor might continue to collect in the assets in every other part of the world, and might waste them as fast as he collected them. This would be fatal to the security in many instances, and would have been so in the present, most of the assets being in this State.

Thirdly. All persons who have a special property, and are answerable over, may maintain an action of detinue. 2 Ba. Ab., 46; 3 Com. Digest, 358. In this case the plaintiff had a special property in the slaves, was legally in possession of them, and is answerable over to the creditors and legatees. The action will, therefore, well lie, unless the circumstance of his having named himself trustee is fatal to it. That addition is mere surplusage, and will not vitiate the action. The plaintiff declared on his own possession, and therefore the addition of trustee can have no more influence in the cause, than if an executor should bring an action on his own contract for the sale of the assets, and name himself executor; which has always been held to be surplusage.

Haywood, for the defendant. The probate of the will, and grant of letters testamentary in this case, extended only to the State of Virginia. The executrix herself could not maintain an action here, without first obtaining letters in this State. It is indeed, true, that the will vested in the executrix a right to the testator's property in every part of the world; but Virginia could not give the authority necessary to enable her to maintain a suit for it beyond the limits of that State; the authority and remedy must be given by the court having jurisdiction where the property is found. But if the authority of the executrix extended to this State, and she might have maintained an action here by virtue thereof, yet it does not follow that this action will lie in the name of the plaintiff as trustee by virtue of that

authority. For neither the act or order of the court of Virginia extended to this State; and if they had, they would not support the action. They only gave him the right of possessing the assets, and not the right of transacting the business of the estate in his own name. No inconvenience or injustice will arise from this construction, because he may prosecute suits in the name of the executrix, and defend such as may be brought against her. Thus far, perhaps, the courts will take notice of his interest, and enable him to defend it.

As the plaintiff has brought his action as trustee, and declared in his own possession as trustee, he must shew a title as trustee, or he cannot recover. His possession in this State being in his individual capacity, will not support the action. He makes out his title to the property by means of the trust; consequently, it was necessary to name himself trustee, as much so as it would have been to have named himself executor, had he been suing in that right. Indeed, he alledges that he possesses the authority of an executor: and surely, if he had brought his action as executor, he could not recover in his individual capacity.

By the Court. It appears by the record in this case, that the plaintiff had possession of the property in question, under an order of the court of Halifax county in the State of Virginia, which directed that the property should be delivered by the executrix to him for his greater security; and that the Court was empowered by the laws of that State to make such an order. It has been urged for the defendant, that the executrix herself could not maintain an action in this State, by virtue of letters testamentary obtained in Virginia; and that the plaintiff could not derive an authority from her, to bring suits, which she herself did not possess. That point has never been directly decided in this State, nor is it indispensably necessary that it should be decided in this case. If, however, the executrix had sold the property, and the purchaser in consequence thereof had obtained the possession of it, that purchaser could maintain an action for it in this State, in case he became dispossessed of it. So, in the present case, the property was conveyed to the plaintiff

under very high authority, so much so, that we are inclined to believe, that against that conveyance (or what is tantamount thereto, the order of the court) an action could not be sustained for it by the executrix in her own name. If so, the power of suing devolved upon the plaintiff. But be this as it may, we think this action may be sustained by the present plaintiff, by virtue of the right which he derived to the property from the order of the court, and the possession which he had of it under that order. For this reason, we think judgment should be entered for the plaintiff.

JOSEPH BROWN v. ELIZA LUTTERLOH.—Page 425.

A demise laid to have commenced on the 1st of February, 1801, and possession taken under it; "Afterwards, to-wit, on the 1st of January, 1801, defendant entered," &c. This was held good, for the word "afterwards" shews that the entry of the defendant was after the demise to, and possession of, the plaintiff; and the words "1st of January, 1801," being repugnant, may be rejected.

This was an action of ejectment in the Superior Court of Hillsborough district, on the trial at October term, 1802. The plaintiff abandoned the first count in his declaration, which was on the demise of one Pilkington, and gave evidence sufficient to support the last, which was on the demise of Joseph Brown. The defendant, however, having taken, in the course of the trial, an objection to this count, the judge advised the jury to find a verdict for the plaintiff, subject to the opinion of the court on the sufficiency of that count; and a verdict was accordingly entered.

The second count laid the demise to John Doe, the nominal plaintiff on the 1st day of February, 1801, to hold from the 31st of January then last past, the term of twenty years. And thus proceeded, "by virtue of which demise the said John Doe entered into the tenement and land

last aforesaid, with the appurtenances, and was thereof possessed, until the said Richard Doe afterwards, to wit, on the first day of January in the year last aforesaid, with force and arms, entered into the same tenement and land with the appurtenances, in and upon the possession of the said John Doe and him from his said farm (his term therein being not yet expired) ejected, expelled and removed, and the said John Doe being so ejected, expelled and removed, the said Richard Doe hath withheld from him, and still doth withhold from him the possession thereof."

The objection taken by the defendant's counsel was, that the ouster was laid before the commencement of the term.

Haywood, for the plaintiff. Before I say anything immediately to this case, I will briefly state the nature of an action of ejectment, and the manner in which courts have latterly considered and treated that action. They view it as a fiction created by them for the benefit of the parties, and the advancement of justice. The plaintiff, the demise, the entry of the plaintiff, the defendant, the entry of the defendant and ouster of the plaintiff, are all mere fictions, and they never existed. The lessor of the plaintiff, and the tenant in possession are the persons really interested; and the question to be tried is, whether the lessor, at the time the action was commenced, had such a title as would enable him to make the lease stated. It is a creature of the court entirely under the control of the court, open to every regulation and order, necessary to expedite the real justice of the case. If the lessor of the plaintiff shews a sufficient title, the court will not permit him to be disappointed by an objection to the fictitious parts of the declaration; for fictions are created by the law and practice of courts, for the benefit of suitors, and are so governed as to prevent an injury by their operation. Sheridan's Prac., 504; 4 Bur., 2449; 3 Black Rep., 940, 931; 2 Bur., 667; 3 Bur., 1292, 1294, 1295; 1 Bur. 134, 629; Runn., 1, 2; 1 Mod., 252; Hay. Rep., 329, 501.

The objection in this case ought to be considered by the court, as if taken by way of reasons in arrest of judgment; and not as an objection to the plaintiff's title or the suffi-

ciency of his evidence. For it is not the province of the jury to judge of the regularity and sufficiency of the pleadings, but of the court. And, therefore, as the plaintiff's title was proved, the jury ought to have given him a general verdict, without paying any attention to the objection, which could not be regularly urged in any other manner but in arrest of judgment. The jury were, in fact, sworn to try, the title of Joseph Brown, and not whether Joseph Brown made the lease to John Doe stated in the declaration, and whether he entered, &c., and Richard Roe ousted him, &c., consequently it was improper for them to render a verdict subject to the opinion of the court on those questions, they being not at all involved in the enquiry before them. Hay., 501, 330. A practice of subjecting verdicts to the sufficiency of pleadings, would indirectly repeal most of the statutes of jeofail, and if it should prevail in this case, would deprive the plaintiff of the benefit of of those statutes.

It is not necessary for the plaintiff expressly to mention the day of the ouster, provided it appears to be after the commencement of the term, and before the action was brought. Runn., 216; Cro. Ja., 312.

If the plaintiff expressly lays the ouster before the commencement of the term—or at a time not arrived—or at a time in any other manner impossible or repugnant; or states the term in such a manner as that it appears to have expired before the commencement of the action, or before the verdict; the defect may be amended before the trial, and is cured by a general verdict. Runn., 216; Esp., 445; Bul, 106; 2 Bur. 1159, 1162; 4 Bur., 2414; Cro. Ja., 96, 154, 426, 428, 312; Hay. Rep., 501.

The plaintiff by his declaration alleges, that he, by virtue of the demise, entered on the premises, and was thereof possessed, until the said R. R. afterwards entered into the same tenement upon the possession of the plaintiff, and ejected, expelled, and removed him from his said farm; and that the plaintiff being so ejected, expelled, and removed, the said Richard Roe hath hitherto withheld from him, and still doth withhold from him the possession

thereof. Is it possible that any man who has the smallest knowledge of the English language, and who is in the enjoyment of a single ray of reason, can read this allegation without deciding in an instant that the plaintiff entered after the demise, and was ousted before he brought his action; and that the first day of January was inserted by mistake, instead of the first day of February. That day is repugnant to all the rest of the declaration, and must be rejected, the count being good without mentioning the day of the ouster.

John Williams, for the defendant. The question for the decision of the court, is, whether the second count is sufficient to enable the plaintiff to recover upon? In the second count the demise is laid on the first day of February, 1801, for twenty years from the thirty-first day of January then last past. An entry is alleged by virtue of that demise; and the ouster is laid to have been afterwards, to wit, on the first day of January in the year last aforesaid. Now it is a rule in law, that in ejectments the demise must be laid after the lessor's title accrued, and on some day before the delivery of the declaration. Runn., 82; 2Stra,, 1077; Lill. P. Reg., 503. The commencement of the supposed lease must be laid at a time preceding the ouster. Runn. 84; Yelv. 182. But the law does not necessarily oblige the plaintiff expressly to mention the day of the ouster, so that it appears to have been after the term commenced, and before the action brought. Runn., 85, Cro. Ja., 312.

The objections to the second count arise on the laying the ouster, viz: 1. If the day and month laid under the scilicet is to have any effect, then the ouster is laid before the commencement of the lease, and a month before the plaintiff confessedly had any title. 2dly. If that day and month, viz. 1st day of January be rejected, then the ouster is not expressly laid before the action brought, which is as necessary, according to the rule, as that it should appear to have been after the term commenced.

The general rule of law in declarations, in all actions requires that all substantial facts should be laid in proper time and place. 1 Ba. Ab., 102. But I admit that it has

been held in Cro. Ja., 312, that the day of the ouster is not necessary to be mentioned; but then I contend that it must in some other manner appear from the month or year, that it was committed, before an action was brought; that in all those cases the decision has been either in arrest of judgment after verdict, or in error. This clearly appears to have been the opinion of the court in the same authorities. Time is never wholly dispensed with, but some part of it must be inserted in the declaration, to shew that the ouster complained of, was committed before the bringing of the action. Thus, if the ouster be laid in such a year, without naming the month or day, it is good after verdict, if the action appears to be brought in some subsequent year, as in the case of *Merrit* v. *Smith*, Cro. Ja., 342, where the ouster was laid the 6th of James, and the action brought the 7th of James; but, if as in the present case, the ouster had been laid, and the action brought in the same year, and there had been no month or day of the ouster mentioned, then the ouster would not have appeared before the commencement of the action, and it would have been bad, as plainly appeared from that case; for the court there held that the ejectment being made between the making the lease and the bringing the action, was good enough, alt ough there be not any day alleged. Jo, in Adams and Goose, Cro. Ja., 98, a case like the present, on the ouster being laid under a scilicet before the commencement of the term, the day under the scilicet was rejected, as being repugnant to the word postea; and although the day of the ouster was rejected, and so no day laid, yet it was held good after verdict on motion in arrest of judgment; because the commencement of the action appeared of record, and the month and year of the ouster were expressed, viz. September 2, Ja. 1, and the action was brought March 3, Ja. 1, it was, therefore expressed to be before action brought, and so good. And so in *Jesmond* v. *Johnston*, where, in trover, the conversion was laid postea, viz. 1 May, 14 Ja. 1, and the possession the 3d May in the same year, and held good, the action appearing to have been brought before. In the present case, the ouster and commencement of the action,

were in the same year. The action was commenced early in the year, and the time of the year in which the ouster was committed, does not appear.

It was argued, that as the declaration alleges the ouster as a fact in the perfect time, it must be presumed before the action brought. The rule I have shewn, negatives all presumption. The presumption and rule cannot stand together. A day and time is necessary in all actions; and particularly, in assumpsit, the time of the promise; in trover, of the conversion; and in ejectment, of the lease. 1 Com. Dig., 331; Cro. C. Eli., 96; Plow., 24. And that, if no time be laid but after a verdict, and that be rejected, it is bad. 5 Com. Dig., 332, 333.

It is to be remarked, that the question before the court, is before it as on demurrer. There is no verdict for the plaintiff to cure any ambiguity. The verdict depends on the decision of the question; if the second count be good, then it is for the plaintiff, but if bad then for the defendant. The objection was taken at the trial as early as the defendant could. She could not demur in ejectment. Runn., 71; 3 Bl. Com., 202. And that such objections would prevail on demurrer. 5 Com. Dig., 331, 332, 333; Cro. Eli., 37; Plow., 14.

Haywood. Mr. Williams insists, that the case ought to be considered as upon special demurrer, because the defendant took the exception at the earliest stage of the proceeding, in her power, and because a defendant cannot demur in ejectment; yet he says, that such an objection would be good upon demurrer. This argument is completely *felo de se*, for if the objection would, in this action be fatal, the courts would permit the defendant to demur. But the courts, always averse to objections which destroy the action, without deciding the merits of the case, and having the tenant in possession, in their power, will not permit him to take such an objection, even at the first stage of the cause, but will compel him to enter into the common rule, and thereby oblige him to try the merits of the case only. How absured would it then be, to allow the objection to be taken at the time, and in the manner now attempted. The court

will consider the whole record, and if it contains sufficient matter, will give judgment for the plaintiff, notwithstanding any irregularity in entering the verdict, or subjecting it to a question arising merely in the regularity of the pleadings. The case, therefore, stands as upon a general verdict, and reasons in arrest of judgment; consequently, according to the cases cited, judgment ought to be given for the plaintiff.

By the Court. It appears to us that it may be taken, that the ejectment took place between the time of the ouster laid, and the time of the commencement of the action. If so, the declaration is sufficiently certain to enable the plaintiff to recover, for it is not necessary that it should be stated that the ejectment was made on any particular day. *Merrett* v. *Smith*, Cro. Ja., 311. It is true, in that case, the year in which the ejectment was made is set forth; but it is said, without particular reference to that circumstance, that the ejectment being made between the making of the lease and the commencement of the action, is good enough, although there be not any day certain alleged. To examine this case by that rule. The demise is laid on the first day of February, 1801, and a possession under it is not stated until afterwards, to-wit, on the first day of January last aforesaid, the ejectment took place. Upon the authority of the case of *Adams* v. *Goose*, Cro. Ja., 96. Buller, 106, the words "to-wit, on the first day of January last aforesaid," being impossible and repugnant, should be rejected; if so, it will appear clear enough that the ejectment happened *after* the lease was made, and also *after* there was a possession under it. The declaration then states, that "the said John Doe being so ejected, &c., the said R. R. hath hitherto withheld from him, and still doth withhold from him, the possession thereof. At what time is it supposed the declaration speaks this language? At the moment it has become an instrument in the hands of the law to have justice done to the plaintiff. If so, it must be understood to speak of an injury, which has already been committed, and not of one which after that time might be committed. If, therefore, an action of ejectment was not the creature of the court,

open to every equitable regulation for expediting the true justice of the case (contrary to what is expressed in the case of *Lee* v. *Ellis*, 2 Black. Rep., 940) and was it altogether unconnected with fiction, we should understand the declaration as stating a fact which *had* happened after the lease made, and before the action brought; and think the allegation of the trespass and ejectment sufficient. We are, therefore, of opinion, that the plaintiff is entitled to judgment.

NOTE.—See *Hogg* v. *Shaw*, post, 457.

WAIGHTSTILL AVERY v. JOHN STROTHER.—Page 434.

Lands lying in one county, cannot, under the entry laws of this State; be entered in another; and a grant issued on an entry made in another county is void.

Entries and grants of land within the Indian boundaries are void under the act of 1783.

This was an action of Ejectment brought in Morgan Superior Court, for the recovery of a tract of land, situated on the west side of Pigeon river, opposite to the Flowery Garden. The record states a case agreed, which in substance is as follows, to-wit, 1st: That the line agreed upon by the treaty, made at the Long Island of Holston, in the year 1777, between the white people and the Cherokee Indians, is the same, from the cession line to the Apalachian ridge, as the line described in the acts of the Assembly, passed April, 1778, and May, 1783.

2d. That the tract of land claimed by the parties, in this suit, is the same; and is situated on tho west side of the big Pigeon River, within the territory set apart for the Cherokee Indians, by the act of Assembly, passed May, 1783.

3d. That the plaintiff claims by an entry made in the Entry office of Rutherford county, in July, 1791, after the treaty

made by Blount in the same year, and before the ratification thereof; and a grant issued on the said entry on the 4th day of January, 1792.

4th. That the county of Buncombe was established, by an act of the General Assembly, passed in December, 1791, after the ratification of the treaty obtained by Blount; and that the defendant claims by virtue of an entry made in the entry office of the said county of Buncombe, and a grant therein obtained.

5th. That the Indians, by the treaty so effected by Blount, sold the land in dispute, with other lands, and received the full consideration agreed upon, as the price of those lands, except the annual pension, before the entry made by the plaintiff as aforesaid; and that the same were ceded by the Indians, and became the property of the State of North Carolina, by virtue of that treaty, and the Indian title thereby extinguished.

6th. That the said treaty was ratified before the date of the plaintiff's grant; and that it was known to the Governor, at the time of issuing the said grant, that the land therein granted, was part of the lands acquired by the said treaty.

7th. That the land in dispute lies to the south of Granville's line; and that by act of Assembly, passed in November, 1788, the lands lying to the south of Granville's line, west of the Indian boundary, were added to the county of Rutherford.

Argument for the plaintiff. A treaty becomes obligatorg by the execution, and begins to operate at that time, without the aid of a ratification: Therefore, in this instance, the Cherokees having executed the treaty, with the intention of conveying their lands, and having at the same time required the full consideration for them, had done everything on their part which was necessary, to vest the lands completely in the State of North Carolina; and the subsequent ratification confined that operation from the date of the treaty; consequently the fee simple of the land in question, was vested in the State at the time the plaintiff made his entry.

The reason and intention of the acts of Assembly, passed

in April, 1778, and May, 1783, so far as they prohibited the entry of lands over what was in those acts designated the Indian line, was to protect the Indian lands from encroachments by the white people; when, therefore, the Indian title was extinguished by the sale of the lands, those acts ceased to operate, there being no longer any subject matter on which they could operate, and consequently were virtually repealed by that treaty. The effect of those acts being thus removed, the entry in question, and the grant founded on it are good, and the plaintiff's title sufficient to enable him to recover in this action.

Argument for the defendant. The plaintiff can recover only by the strength of his own title; and if it shall appear that this title is bad, judgment ought to be given for the defendant.

It is believed that the plaintiff's grant is void on two grounds. First, Because the lands when entered did not lie in the county of Rutherford, where the entry was made. Secondly, Because the entry was prohibited, and the grant obtained therein, declared void, by the act of Assembly, passed 1783, sec. 6.

It is agreed that the land in dispute lies on the west side of Big Pidgeon river, within the lands described by the act of 1783, sec. 5; and by that act reserved to the Cherokee Indians. Rutherford county, by section 23 of that act, and by the act of 1788, ch. 10, was extended, west, to the Indian boundary, as limited by the act of 1783, that is to Big Pidgeon river, and not to any line or boundary which might afterwards be made; and there is no act of Assembly extending that county beyond, or authorizing an entry in that county of lands on the west side of that river.

It may also be observed, from the case agreed, that the land in dispute lies within the bounds described by the third section of the act of 1783, ch. 2, for which lands (except those prohibited) John Armstrong's office was opened, and again discontinued in the year 1784; after which, until Buncombe was established a county, no office existed in which those lands could be entered.

If the plaintiff had any authority for making his entry, he must have derived it from the act of 1777, ch. 1, revived by the act of 1783, except so far as it comes within the purview of the last mentioned act. The act of 1777 ascertains *what lands* may be entered, and points out the manner in which title shall be obtained. It provides only for entering with the Entry taker of any county a claim of lands *lying within such county.* The Legislature foresaw that much inconvenience and mischief would follow, if lands were permitted to be entered in a different county from that in which they lay; and to provide against every possible mischief of that kind, by section 9, grants, not obtained in the manner by the act directed, or in the evasion of the provisions and restrictions thereof, are declared utterly void.

The land in dispute did not lie within the county of Rutherford, nor within any other county, at the time the entry was made, but within the district for which the office had been discontinued: the grant, therefore, having not been obtained in the manner the act pointed out, but contrary to the provisions and restrictions thereof, and there being no other law authorizing the plaintiff's entry, it is concluded that his grant is utterty void.

In the act of 1788, ch. 10, there is a legislative declaration, that entries in Burke and Rutherford, of lands not in the counties where the entries were made, are contrary to the intent and meaning of the acts in such case provided; and from the acts of 1784, ch. 17, 79, sec. 3, and ch. 45, sec. 4, the like inference may be drawn. As much property depends on this question, the opinion of the court on this part of the case, would be very desirable.

Secondly. It is agreed, that the land in dispute lies within the bounds set apart to the Cherokees, by the act of 1783, sec. 5; by the same act, sec. 6, all entries of land within those bounds, and grants obtained thereon, are declared void. The prohibition in this act continued until the lands should accrue to the State, by treaty or conquest, so as to come within the provisions of the act of 1777, sec. 3. And it is denied that those lands accrued to the State, until the ratification of Blount's treaty. By article the

15th of that treaty, it was to take effect from and after the ratification thereof; so that, by the treaty itself, it was stipulated that the Indian title to those lands should accrue to the State from the ratification, until which time it remained in the Cherokees. The plaintiff's entry being made previous to the ratification, and before the title accrued to the State, the grant obtained thereon is made void by the 6th sec. of the act of 1783.

It is contended that the defendant's title is good. Buncombe, after the ratification of the treaty, was established a county, by act of Assembly, in December, 1791, with all the rights, privileges and immunities of other counties. Few or none of the acts of Assembly establishing other counties, since the act of 1777, mention anything with regard to entering lands; yet all of them have opened offices for receiving entries; and their right to do so has never been questioned. The defendant's entry was made in the county of Buncombe, in which county the land lay, and after it had accrued to the State by purchase.

Johnston, J. By the act of Nov., 1777, sec. 3, a right is given to the persons therein described; "To enter with the entry-taker of any county within this State, a claim for any lands lying in *such* county." It appears that the lands in question are situate in Buncombe county, and that the entry was made with the entry-taker for the county of Rutherford, who had no right to take entry of lands, except within that county; he, therefore, in this particular, did an act not founded on any authority, and of course a mere nullity in itself, on which no legal grant could issue. The same act, sec. 9, declares, that every right, title, &c., which shall not be obtained in the manner by the act directed, or by fraud, *illusion or evasion* of the provisions and restrictions thereof, are deemed and declared utterly void.

The grant to the plaintiff appears to me to come expressly under this description: it was obtained by a process not warranted by the act of Assembly, there being no entry, such as was described by the act; there was no ground for issuing the grant; it was, therefore, obtained fraudulently,

with a manifest view to elude and evade the act; and consequently utterly void. I am, therefore, upon this point, without going into the other matters stated in the case, of opinion, that judgment be entered for the defendant.

MACAY, TAYLOR and HALL, Judges. By the act of Assembly, passed in the year 1783, chap. 2, sec. 5, the land in question was included within the Indian boundaries, and reserved to the Cherokee nation; by the act of 1778, chap. 3, sec. 5, all entries and surveys of land, which had been made, or thereafter should be made within the Indian boundaries, were declared to be utterly void, and of no force or effect; and by the act of 1783, chap. 2, sec. 5, all such entries and grants therein, are declared utterly void. The plaintiff's entry was made within the Indian boundaries; consequently his entry and grant are both void, and therefore, he has no title to the premises in question. Judgment for the defendant.

NOTE.—See on the first point, *Lunsford* v. *Bostion*, 1 Dev. Eq. Rep., 483. See also act, 1 Rev. Stat., ch. 42, sec. 29, which validates such entries and grants under certain circumstances.

JUNE TERM, 1803.

SAMUEL DICKERSON v. JOSIAH COLLINS AND NATHANIEL ALLEN, AND JOSIAH COLLINS v. SAMUEL DICKERSON AND NATHANIEL ALLEN.—Page 441.

When three tenants in common sell their estate at auction, confining the bidding to themselves, the purchaser must pay to the other two the whole amount he bids, and not *two-thirds* only.

The complainants and defendants being seized, as tenants in common, of a large tract of land, covenanted with each other to put up and sell, in one lot, part of the tract; no person to bid except themselves; the highest bidder to be the purchaser. The purchaser or purchasers to be allowed

two years' credit, on his or their giving bond with approved security for the purchase money, with lawful interest from the date thereof. The land was accordingly put up on the 9th day of December, 1789, and purchased by Dickerson. In May, 1791, he tendered a deed for the land to Nathaniel Allen to be executed, and a bond for one-third of the purchase money, bearing interest from that time; Allen accepted the bond and executed the deed. A like tender being made at the same time to Collins, he refused to execute the one, or accept the other.

Macay, J. This must be considered as a sale, and the sum bid, as the price or purchase money; and as the parties had contracted that bond and security should be given for the purchase money, with interest from the date, Dickerson becoming the highest bidder, Collins is entitled to one-half of the purchase money, with interest thereon, from the day of sale until paid. And on receiving the principal and interest, he shall do such acts as shall secure to the defendant Dickerson, an estate in fee simple, in said lands.

Taylor, J. I cannot, after a frequent revision of my first impressions in this case, reconcile my mind to any other construction of the agreement, than that which requires the purchaser to give bond and security for the whole amount of the purchase money. There is surely weight in the argument, that as the bidding was confined to the partners, the purchaser cannot be understood to have bought his own right, which remained as it was before the sale, and could not be an ingredient in his estimation of the price. The spirit of the agreement seems to be, that any one of the partners may buy out the other two, or that any two may buy out the third; and that the highest sum bid, shall be the consideration of the shares so purchased. So material a change of the contract, as that of lessening the price in the proportion of the purchaser's share, ought not to be made, without the most clear and explicit understanding of the parties; or unless it resulted plainly from the words of the agreement. As the interest of these parties was before the sale, equal, it appears to me, no one could bid more than he

was willing to give, constantly keeping in view, that he was purchasing what belonged to others, and not that which he already owned. Indeed so far as any light is reflected from usage, it is favorable to such a construction; particularly to the case of joint owner of vessels setting them up to the highest bidder, and excluding strangers.

Hall, J. It is the wish of the parties, that this agreement should be carried into effect. Collins insists that he is entitled to half, and not a third only, of the purchase money; Dickerson insists, and Allen agrees with him in opinion that he is entitled to only a third of it. I think it must have been the understanding of the parties that the bonds should be executed, in a reasonable time after the sale; otherwise interest from the sale to the time of executing them would be lost. It is true, Dickerson alleges as a reason for not having made a tender of them sooner, the difficulty he met with in procuring a deed to be drawn for the land, which would meet with the approbation of Collins. Be this as it may, I think Collins is entitled to interest from the time of the sale to the time of the tender of the bonds, or whatever principal sum is due to him. I also think he is entitled to interest from that time until payment shall be made, provided he is entitled to one-half, instead of one-third of the purchase money. This seems to be the great point on which the parties differed in opinion, and which prevented them from carrying the contract into effect. If the land had been exposed to public sale, the purchaser would have been compelled to pay the full amount of the money bid, because it would have been understood to be the value of the land, and the purchaser would have had no interest in it until it was sold. If, at such sale, one of the owners of the land had bid for it, which he might have done, the money bid by him would also have been considered as the value of the land; but he would have been entitled to a deduction of one-third, on account of his interest in it. The only difference between such sale and the one in question, is, that the liberty of bidding was reserved to the proprietors only. Why was it thus exposed to sale? In order that the value of it might

be ascertained; that he who fixed the highest value on it should become the purchaser; but being already owner of a third part of it, I think he is, on that account, entitled to a deduction of one-third of the amount bid for the land. In the case of a sale made by a company of merchants, of any article, as mentioned by Dickerson's counsel, if one of the company became the purchaser, he would be charged in the books of the company, with the full amount of the money bid by him; but being one of the company, he would be entitled to a credit equal to his interest in the concern. It has been alleged by Collins, that Dickerson bid off the land for himself and Allen, under some agreement made by them for that purpose I cannot see how that circumstance can affect the case. They had a right, certainly to make such a contract, or any other that did not interfere with the one they had made with Collins.

It is no matter for whose benefit it was bid off by Dickerson, provided he acted up to that agreement. When £3,060 were bid for the land, Collins might have bid more, if he thought that sum under the full value; he did not chuse to do so, because (the presumption is) he supposed it was not worth more. If indeed Collins had not been able to purchase their rights, upon the terms on which the sale took place, or if he had been misled by false appearances, by them held out for that purpose, and on either of these accounts the land had sold for less than its value, because they did not bid against each other, and that for the purpose of defrauding him, there would be something in the allegation. This, however, it does not appear was the case. I am therefore of opinion, that Collins is entitled to one-third of the purchase money only, with interest thereon from the time of the sale until he refused to execute the deed, &c., that from that time until he shall execute the deed, interest shall stop; that Dickerson, upon the execution of a sufficient deed, shall either pay the aforesaid principal and interest, or cause the sum to be paid in a short time.

Decree. That the purchase money, that is to say, the one-half of the sum bid, with interest from the day of sale,

be paid to Josiah Collins; and on the receipt of said sum and interest, that Josiah Collins shall convey the land so purchased in fee.

ROBERT OGDEN, Adm'r. of Cornell v. BRITTAIN KING'S EX'RS.—Page 446.

Interest will continue to accrue on a debt, if the creditor were in this country when the debts became due, although he be afterwards absent without leaving an agent.

Action of debt on a single bill for money, payable on the 2d day of June, 1774. On the trial the jury found the issues for the plaintiff and assessed in damages interest from the issuing the writ only. The plaintiff moved for a new trial, on the ground, that he was entitled to interest from the day of payment.

Samuel Cornell, the intestate, was a British subject, resident at Newbern, on the 17th day of August, 1775, he left that place and went to England, where he remained until December, 1777, when he returned to Newbern, but was not permitted to come on shore, he refusing to comply with the requisites of the Acts of Assembly, concerning absentees. He died in February, 1778, at New York, leaving a will, which was proved, and one of the executors qualified, who died in 1786. On the second Monday of March, 1798, the plaintiff obtained letters of administration in this State.

Macay, J. This bebt became due the 22d day of June, 1774. Samuel Cornell continued in this State, then province of North Carolina, until the 17th day of August, 1775, above one year after the money was payable. It was then the duty of Britain King to have paid the debt; and having failed to do what he ought to have done, he must answer the consequences. 1 Fonb. 424, 425. The jury have allowed interest only from the issuing of the writ,

13th day of August, 1798. I am therefore of opinion a new trial ought to be granted.

Johnston, J. It is a settled rule both in law and equity, that the plaintiff shall recover interest from the time his debts became due. "It is the constant practice," says Lord Thurlow at Guildhall, "either by the contract or in damages, to give interest on every debt detained. 1 Vez. jun., 63. When a note is due it bears interest from that time. Esp., 170; *Blaney v. Hendrick*, 3 Wels. 205. Now the note in this case, became due June, 1774, at which time it became the duty of the defendant to pay, or tender the money; on his failure, he became bound to pay interest as damages for the detention. The plaintiff's intestate did not leave the country until upwards of a year after the note became due; his leaving the country afterwards is no reason why the defendant should be excused from the payment of interest, as the first default was in him; and if from this, he now suffers any inconvenience, it cannot be charged to the absence of the intestate. "But every man must suffer for his own delay or neglect. And therefore he who does not perform his part of the contract at the time agreed on by the parties, or appointed by law, must stand to all the consequences." 1 Fonb., 424, 425; 2 Fonb., 431." And a Court of Equity will not give relief in such cases. It is unnecessary to decide in this case, how far a defendant would be liable to the payment of interest, where at times when the money became due, the plaintiff was absent from the country and had carried the evidence of the debt with him; or dead, and no person leagally authorized to receive the debt and give a discharge; so that the defendant had it not in his power to comply with the contract: therefore I give no opinion as to that point. I have not however, been able to discover from my reasearches, any case where the defendant has been excused from the payment of interest under such circumstances. The general principle seems to be, that the defendant having the possession and use of the money, the presumption is, that he made a profit from it equal to the interest. But this appears to me to be a principle, which would, if

strictly applied, impose a very great hardship, if not a manifest injustice, on a punctual and conscientious debtor, who had provided the money at the day, and held it at his own risk, till there was a person who had a right to receive it, and to whom he could pay it with safety.

I am of opinion, under the circumstances of this case, that the plaintiff is entitled to interest, in damages, from the time that the note became due, deducting only the time of the war, as regulated by the act of Assembly, till the time of entering the verdict. 2 Bur., 1077, 1094; 3 Bur., 1375; 5 Term Rep., 556.

Judge TAYLOR and Judge HALL, concurred with this opinion. Rule made absolute.

NOTE.—A debtor, who is ready to pay his debt when it becomes due, is excused from paying interest thereon, if the creditor conceals his place of residence, and the debtor knows not where to apply to make payment. *Child* v. *Devereux*, 1 Murph. Rep., 398.

JOHN WILKINS v. GEORGE McKINSIE.—Page 448.

Where A. had money in the hands of B. who could not pay it but offered a bill on New York, which A. did not want, but finding that C. was willing to take it, received the money from him, and C. in consequence of an order from A. received from B. his bill of exchange; and upon the protest of this bill, and B.'s failure, *held* that A. was not accountable to C. for the money paid for the bill, as he was neither endorser nor had promised to become responsible.

This was an action of assumpsit for money had and received to the plaintiff's use, tried in Wilmington Superior Court, May term, 1803, when a verdict was taken for the plaintiff, subject to the opinion of the court on the following case:

M'Kinsie had money in the hands of John Barclay, and applied to him for 1,000 dollars. Barclay could not raise the money, but could draw bills on New York. M'K. did

not want money in New York, but undertook to sell B.'s bills, and applied to Wilkings, who said he wanted a bill on New York and would pay 500 dollars down, and give his note for the balance, payable in a short time, if the bills were drawn in sixty days. M'K. agreed. Wilkings paid the 500 dollars, and gave his note to M'K. for the balance; and M'K. gave an order to W. on B. for 1,000 dollars. W. applied and got B.'s bill for 1,000, which was returned protested for non payment. M'K. sued W. and recovered the amount of the note: and now this suit is brought to recover back the 1,000 dollars, being the amount paid by W. to M'K. The bill was in due time forwarded to New York, protested and returned; of which due notice was given to M'K. and also notice that the order was not satisfied; which was protested as appears by the written protest. The notice was given immediately after the bill was returned. But before the return of the bill, B. committed an act of bankruptcy, to wit, on the 26th January, 1802, and was declared a bankrupt sometime about the latter end of February, or beginning of March. That the order was drawn for money, and was retained by W.; but it was understood by the parties that W. was to receive a bill of exchange.

Jocelyn, who argued this case for the plaintiff, cited 12 Mod., 408; 2 Salk., 442.

Wright, who argued for the defendant, cited 6 Term, 52, and 7 Term, 65.

Macay, J. From the case stated, it appears to me that M'K. sold the bill of exchange to the plaintiff, and received the money as to the price thereof; and that Wilkings took upon himself all the consequences. In this point of view the law is settled. 3 Term, 757; Andrews, 108; 1 Salk., 124; 12 Mod., 408. And therefore a new trial ought to be granted.

Johnston, J. It appears to me that in this case there is no cause of action against the defendant. He contracted that Barclay, who was then in good credit, and as well known to the plaintiff, a merchant residing in the same town,

as to the defendant residing in the country, should draw a bill in favour of the plaintiff; neither of them had any doubt of the goodness of the bill. When the plaintiff received Barclay's bill the contract of the defendant was fulfilled; the money was applied to the use of Barclay by being immediately placed to his credit, in discharge of his debt due to the defendant; and the plaintiff was accommodated with the bill contracted for. The defendant had nothing further to do; his placing the money to the credit of Barclay, was the same as if Barclay had himself received the money and paid it into the hands of the defendant. The whole must be considered as one entire transaction, the same as if the defendant, instead of drawing an order, had accompanied the plaintiff to Barclay, who having received his bill and paid his money, and Barclay had immediately handed it over to the defendant in payment. In such case the defendant could not be held accountable, and this does not appear to me to differ in substance from the present case. In the case 6 Term., 52, the defendant gave a draft assuring the plaintiff it would be immediately paid—in this case M'Kinsie gave no such assurance, the bill was taken on the credit of Barclay only. In the case, 7 Term., 64, the question was, whether the plaintiff had such a property in the plate, as would entitle him to recover in an action of trover. It was held that he had not, there being no actual delivery, and the notes for the plate not being paid, in consequence of the bankruptcy of the banker. This case differs essentially from the case in question. The case, 2 Salk, 442, does not apply —as in that case the plaintiff did not agree to take paper in discharge of his debt. The case, 3 Term., 757, is much stronger than the case at bar; for there the defendants not only sold the bill of another without endorsing, but after the failure of the person on whom it was drawn, promised to take it up; yet, it appearing that the bill was taken on the credit of the person on whom it was drawn, it was held, by the court, that the defendants were not liable, and that they were not bound by their promise. In the case, 1 Salk., 124, and 12 Mod., 203, it is said, that if

A. sells goods to B., and B. is to give a bill in satisfaction, B. is discharged though the bill is never paid; for the bill is payment. See also the case of the Governor and Company of the Bank of England against Newman.

HALL, J. It does not appear that the plaintiff had any reliance upon the defendant, as to the bill which was drawn by Barclay in favor of the plaintiff. Barclay's circumstances, for aught that appears, were known as well to plaintiff as to the defendant. At that time they were doubted by no person. The defendant was not a party to the bill, nor did it pass from him, either by endorsement, or delivery. If, however, notwithstanding that, it appeared, that it had been the understanding of the parties, that the defendant should stand as a security to it, the case would be different; but as this does not appear to have been the case, I think a new trial should be granted.

Judge TAYLOR concurred with the other Judges.

Rule absolute.

Vide Kyd on bills, 90 to 95; Chitty, 122, 3, 4, 5, and the authorities there cited.

NOTE.—See S. C. upon the new trial as reported in 2 Hay. Rep., 333.

PETER SCHERMERHORN v. CHARLES & PETER PELHAM.—Page 452.

Damages and interest on bills, are to be assessed according to the law of the place where the bill was drawn, and not where it was endorsed.

Action by the endorsee against the enderser of a bill of exchange. Verdict for the plaintiff subject to the opinion of the court: whether damages and interest are to be calculated agreeably to the laws of New York, where the bill was negotiated and endorsed; or agreeably to the laws of .....

.....in the West Indies, where the bill was drawn, and where the drawer resided.

By the Court. The question in this case is, whether the damages to be recovered on a protested bill of exchange, shall be regulated by the laws of the country where the bill is drawn, or of the country where it is endorsed, in an action against an endorser.

The laws of individual States stating the damages to be paid on protested bills of exchange, are frequently different from each other, but always relate to bills drawn within their respective jurisdictions; therefore, though the bill be endorsed over ever so often, and travels through ever so many countries, yet the nature of the original contract is not changed; which is, that if the bills is not paid, the drawer shall be liable to pay, not only the principal, but the damages and interest stipulated by the laws of the country where the bill was drawn. When the bill is endorsed, the endorser places himself in the situation of the original drawer, and subjects himself to the same duties which he was bound to perform; so far it becomes the bill of the endorser, but to call it a new bill *to all intent and purposes*, as was alleged at the bar, would be to destroy the nature of it, by changing it from a foreign to an inland bill. For instance, if A. draws a bill in the island of Jamaica, in favor of B., who resides in New York, on a person resident in that city, B. endorses the bill to C., in the same city; if by this endorsement, it becomes a new bill *to every intent and purpose*, it is then divested of its original character of a foreign, and is changed into an inland bill; and C. in his action against B., the endorser, would be only entitled to common interest. Therefore, all that can be understood, by an endorsement being in the nature of a new bill, is, that the endorser places himself in the situation of the drawer, and must be answerable to the endorser in the same manner as the drawer must ultimately be answerable to him.

JOHN HARDISON v. JOSEPH JORDAN.—Page 454.

A civil action is maintainable against a justice of the peace, acting in his office out of court, either maliciously, oppressively or corruptly.

This action was commenced in Halifax Superior Court of law. The plaintiff declared to-wit:

"Joseph Jordan, late of the county of Bertie, was attached, to answer John Hardison of a plea of trespass on the case, &c. And whereupon the said John Hardison, by Blake Baker, his attorney, complains, that, whereas a certain Amasa Perrin, on the———day of————in the year of our Lord, one thousand seven hundred and ninety-nine, at the county of Bertie aforesaid, had instituted a suit, by way of warrant, against the said John Hardison, for the recovery of a sum of money pretended to be due and owing by the said John Hardison to him the said Amasa Perrin; and the said suit on the day and year aforesaid, at the county aforesaid, was tried by the said Joseph Jordan, a justice of the peace of the said county, who had competent power to try the same. And he, the said Joseph, on such trial, gave judgment against the said John Hardison in favor of the said Amasa Perrin, upon the said warrant, for the sum of six pounds, besides costs of suit. From which judgment of the said Joseph, the said John prayed an appeal to the County Court of Bertie aforesaid. And the said John, then and there, offered to the said Joseph, two good and sufficient securities for prosecuting the said appeal with effect to-wit: Samuel Mares and John Harrison, both of the said county, then and there being sufficient persons, and having each of them, sufficient property within the county aforesaid, and were good and sufficient securities for the said John's prosecuting the said appeal with effect, according to the directions of the act of the General Assembly in such cases made and provided. Nevertheless the said Joseph, being not ignorant of the premises, and well knowing that the said Samuel Mares and John Harrison were good and suffi-

cient securities for the said appeal, as aforesaid; not considering the duties of his said office, and disregarding the directions of the said act of Assimbly, but contriving and maliciously intending unjustly to aggrieve and oppress the said John in this behalf, and unjustly and maliciously to deprive him of his said appeal, and to subject him unjustly and maliciously to the payment of the said unjust judgment and costs, did then and there refuse to accept the said Samuel Mares and John Harrison as securities for the said appeal; and did then and there refuse to grant the said appeal, although he the said Joseph was then and there requested so to do, by him the said John, whereby the said John was *unjustly* and *maliciously* deprived of the said appeal, and was thereby *unjustly compelled* to pay the said sum of six pounds, together with the sum of..... for the costs of the said warrant. Wherefore, &c."

There was another count in substance the same, only, charging that the defendant refused the appeal *corruptly*, &c.

The jury, on the trial at October Term, 1801, found the defendant guilty upon the first count; but not guilty in manner and form as charged in the second count.

The defendant's counsel moved in arrest of judgment, and filed the following reasons, viz:

"1st. Because the defendant was acting in his judicial capacity as a justice of the peace, when he refused to grant an appeal as complained of, and stated in the plaintiff's declaration.

"2d. Because it is not sufficiently stated in the plaintiff's declaration, how the plaintiff suffered any damage in consequence of the defendant's refusing to grant the plaintiff an appeal.

The counsel for the defendant argued, that an action at the suit of the party will not lie against a Judge, on an official act. 1 Danv. Abr., 179, sec. 1, 2, 4.

Or a justice of the peace for what he doth while acting as such. 2 Haw. Pleas of the Crown, ch. 13, sec. 20; Carth., 494. Bacon's Abr., *Appendix*, Justice of Peace, F.

By the Court. A civil action is maintainable against a justice of the peace acting in his office out of court, either maliciously, oppressively or corruptly. 2 Stra., 710.

The declaration states, "the said John was *unjustly* and *maliciously* deprived of his said appeal, and thereby *unjustly compelled* to pay the said sum of six pounds, with the sum of ..... for the costs of said warrant. This appears to us to be sufficiently certain: We are therefore of opinion the reasons in arrest of judgment ought to be overruled.

NOTE.—See *Cunningham* v. *Dilliard*, 4 Dev. & Bat. Rep., 351, which seems to be at variance with this case.

NOKES ON THE DEM. OF JAMES HOGG v. MARRIAN SHAW, et al.—Page 457.

Where the date of the demise and the commencement of the term were left blank in a declaration in ejectment, the declaration was held ill and the judgment arrested.

There were blanks left in the declaration, in this case for the date of the demise, and the commencement of the term; it was perfect in other respects. The jury found a verdict for the plaintiff; and the defendants moved in arrest of judgment, on two reasons, to wit: 1st. That there was no existing term stated in the declaration. 2d. That there was no date to the demise.

Seawell, Attorney General, for defendants. It was contended in the court below, that the present defect was like the cases of impossible dates, and the objection coming after a verdict, is cured. That had the objection been taken at the trial, the court would have amended. I will endeavor to answer them in their turn. The action of ejectment is a possessory action, and the declaration contains a statement of such facts as plaintiff must make out on the trial; namely,

a title in his lessor, a lease to him, his entry *afterwards*, and the ouster, by defendant, after the entry. The lease, entry and ouster in some instances, are still proven, in others admitted by the common rule, and thus the parties proceed to trial without making any further question of them. The notion I entertain of a verdict curing a defect, is that it is some matter of form which does not relate to the plaintiff's title, and is either expressly cured by some one of the statutes, or else is the omission of some allegation which the court will intend was necessarily proven, or the plaintiff would not have obtained a verdict. This leads us to examine whether this be a mere matter of form, or whether we are left at liberty to presume it proven; and a discussion of these two points will answer all the reasoning in support of the declaration. The demise which is stated to have been made, is surely for some purpose; it is intended to shew that the plaintiff is entitled to the posession. Why must it be stated to have been made at a certain time? That it may appear on the face of the proceedings that the entry of and ouster by, defendant, were tortious. It is not contended that a *lease* without a date would be void; such an one would take effect from the delivery; but it is said that when an ejectment is brought upon such a lease, the plaintiff should state in his declaration the time it was made in order that the defendant may appear a wrong doer. If it be said that the lease is mere matter of form, whence arises it, that in a declaration where the plaintiff claims title from two lessors, though in truth they be the absolute and indisputable owners of the land and entitled to the pessession, yet when it appears on trial that they are tenants in common, the plaintiff cannot recover? So if it should appear that one was tenant for life and the other remainderman. Cro. Ja., 613; 6 Coke Rep., 14, 15. Yet if the lease was mere matter of form, these objections ought not to prevail, inasmuch as the plaintiffs have the undoubted right, and by laying separate demises would be entitled to recover. If the lease is mere matter of form, to what purpose are the repeated applications to enlarge the demise or lease? If after ver-

dict they would do no hurt, and if upon the trial the court would amend, we are left to consider, with suprise, that so many of the learned should have labored so hard to obtain these unnecessary amendments. And it seems somewhat contradictory that the Judges should consider themselves employed in the futherance of justice, when in no event the plaintiff could be injured; and that this has been the uniform language of the courts on the enlarging of all demises. See 2 Bl. Rep., 940; 4 Bur., 2447; Hay. Rep., 323.

I am aware that it will be said, the case of Brown and Lutterloh, from Hillsborough, bears some analogy to this. That was where the ouster was laid anterior to the time when the demise was stated to have been made. That case was determined upon the authority of Adams and Goose. Cro. Ja., 96, and *Swimmer* v. *Grovesnor*, cited in Bul. Ni. Pri., (and rightly too in my opinion.) There the court could form a perfect declaration by rejecting what was laid under a solicit, for by rejecting what was laid under that as surplusage, and making the preceeding word "afterwards," relate to the time when the demise was stated to have been made, all was sensible and right, and so was the judgment of the court of Brown and Lutterloh. Compare this case with those cited; is there any part of this declaration which can be rejected, so as to supply the defect and make it sensible? Does it appear on any part of it that the plaintiff has or ever had title to the possession? For the least, entry and ouster, though fictions, are not matters of form, they are contemplated to exist, and whenever it appears that they cannot, and consequently do not, the plaintiff cannot recover. The case of *Baker* v. *Cole*, from Burr., 1159, which was also insisted on at the trial below may deserve a further notice. That was an impossible date, the pleadings were of Hilary term, the first of George the 3d; the demise was stated to have been made the 30th of May, in the 33d year of his said majesty and the ouster afterwards. By examining when the pleadings were made up, and that all these things must have taken place previous thereto: that no 30th day of May antecedent, could have been in the reign of the then

king; by applying these things *secundam subjectam materiam*, the whole could be rectified; and a further difference that there was a sensible, though mistaken date.

But I have not been able to find a single case where an improbable date was held good in a declaration, except perhaps, where it was laid under a scilicet. It is worthy further to remark, that this certainty in the commencement of the demise, (and consequently must be stated with the same) gives birth to its common appellation of term; it is its certain commencement, and certain ending, which circumscribes and *terminates* it. And Mr. Blackstone, in 2 vol. of his Commentaries, page 143, lays it down, that every estate by whatever words created, that has a certain commencement, and certain ending, is an estate for years, and, therefore, is frequently styled a "term" from Terminus, and that every lease for years, which has not a certain beginning and certain ending, is void. It was hinted on the argument below, that the demise in a declaration of ejectment is different from a lease for years; but a little enquiry only, will be necessary to convince us of the inaccuracy of such a doctrine. I will only revert to my argument on the history of the action, and only ask the method which *is* to be used to recover unoccupied premises; there the things are *actually* done, which in the present form exist only in contemplation, and the same kind of lease in the action to recover unoccupied premises, is *supposed* to exist or to have been made, which is actually sealed and delivered in the other case. If then a declaration is served without any statement of demise, would a plaintiff be entitled to judgment? Then a demise stated, which is not certain in itself, and cannot be certain by anything on the face of the proceedings, when examined by the settled rules of law, is void and of no account. It is laid down in Runnington, 90, and 1 Vent., 137; 1 Mod., 180, cited, that where the limitation in the demise is wholly uncertain, it is void, and plaintiff cannot have judgment; it is admitted however, that in the cases cited, the declaration was held good, but they prove the principle laid down by Runnington. If on the trial of ejectment, it should appear

that no demise was stated could the court permit the plaintiff to state one? they could not; and this proven by the authority of Baker and Cole, before cited, where it is expressly ruled, that the court cannot aid a defective title. But in no case whatever, has it ever been held, that the court would amend a total want of title. Let this question be asked, suppose a joint lease should be stated, and upon examination the lessors appear to be tenants in common, would the court permit the plaintiff to amend? If in neither of these cases they would, it must then follow of course, that the demise is something more than matter of form. When a perfect and complete demise is stated, the enlarging that, is only creating a larger estate, and not creating a thing which did not exist before; if then the lease turns out not to be matter of form, but the plaintiff's title, it follows of course, that it is not cured on the score of form.

But with regard to its being now considered as if upon a motion to amend, I contend that it is not the light it should be considered in; it does not follow that because the court would have amended, that the verdict would cure, for I trust I have already shewn, that if the verdict had such effect, the motion to amend would be in all cases useless. Then, this not being matter of form, but really of substance, is not cured by the verdict, unless the court are left to presume that what is omitted was proven on the trial. In the whole course of the trial no question is made as to the making the lease, the defendant takes the plaintiff according to his own statement. No proof in such case could be received, and in truth the jury are never impannelled upon the demise. We, surely then, are not left at liberty to presume that which never could have happened. From an inspection of the proceedings, it appears judicially to the court, that such proof could not have happened, and, therefore, you cannot presume it. The first cases wherein such verdicts cure the declaration, that suggests itself to me, is the case of a declaration for a cheat which must be laid with a *scienter*, when a verdict has passed on a declaration not laid in that manner, the court will not disturb it because they will presume that the *scien-*

ter was proven, otherwise the plaintiff could not have obtained a verdict.

John Williams, for plaintiff. The objections are, 1st. That there is no existing lease. 2d. No date to the demise.

There is on the face of the declaration an unexpired term. The declaration is after the form of one by original, and mentions that Hogg demised the premises for the term of ten years, unexpired and to come.

The verdict shews that a sufficient existing lease was admitted, or the plaintiff could not have obtained it. The term is a mere fiction, for the court compels the defendant to admit it. If any defect had been discovered, it would have been amended. After verdict the court overlooks the exception.

The court will intend any thing to make good the verdict—it will presume a sufficient demise admitted to the jury.

The date is immaterial, if no date it would take effect from the delivery, and this will be presumed. No particular day of the entry or ouster need be mentioned. The date of demise seems therefore immaterial.

2 Stra., 1011, 1109, 1012; 2 Bur., 1160; Esp., 444, 445; 2 Bur., 665, 1159, 1161, 1162; 16 & 17 Car., ch. 8.

By the Court. There is no title whatever stated in the plaintiff's declaration, no ground whereon the court can presume an entry after the lease, and an ouster after the entry, or an unexpired term at the commencement of the lease. Therefore the judgment is arrested.

NOTE.—See *Brown* v. *Lutterloh*, ante, 425.

WILLIAM JOHNSTON and wife v. ABNER PASTEUR.—Page 464.

Husband and wife must join in detinue for her slave detained before and at the time of the marriage.

Detinue lies in every case where the property is detained, and no regard is had to the manner in which the defendant acquired possession.

This was an action of detinue, brought in Newbern Superior Court to recover a negro. On the trial, the jury found a verdict for the plaintiff, subject to the opinion of this court on this point, "whether husband can be joined in detinue for the property of the feme detained before and at the time of the marriage."

This case was argued by Mr. Woods for the plaintiff, and by Mr. Haywood for the defendant.

By the Court. Macay, Taylor, Hall, and Locke. Few questions have been more frequently agitated in this State, than that concerning the extent of a husband's property in slaves belonging to the wife, but not reduced into possession during the coverture. Though the opinions of the Judges on this subject have been different under the former judiciary establishment, and no judgment of sufficient authority was then given so as to settle the law, yet several recent decisions of this Court have distinctly expressed the sentiments of all its members. In this Court it hath been unanimously agreed in each particular case, that slaves to which the wife has title, but of which the enjoyment was prevented during the coverture by an adverse possession, do not, upon the wife's death, devolve upon the husband, by virtue of her marital rights. Should it be thought expedient to reconsider the determination, it may save the trouble of some investigation to those who succeed us, to state the progress of this opinion, and to bring into one view the various cases that have occurred. The first published account of the question is in the case of Whitbie, administrator vs. Frazier, where a woman entitled to the remainder in a slave, after an estate

for life, married and died before the particular tenant. The husband then died without administering upon his wife's effects, and the plaintiffs, as administrators of the wife, recovered the negro in an action of detinue. It appears that the action had before been brought by the husband's administrator, and the case coming on before three judges, two were of opinion that it was misconceived, and the third, though he then thought that the administrator of the husband was the proper person to sue, yet afterwards changed his opinion and concurred in the judgment rendered for the administrator of the wife. This, then, may be considered as a decision of all the judges of the State, so lately as the year 1796, affirming the proposition, that to entitle the husband as such, he must reduce the negroes of the wife into possession during the coverture. If he do not, and survive the wife, he can recover only as her administrator, to which character founding his right as her next of kin, he may recover her choses in action. The next is *Hines* v. *Lewis*, where a woman entitled under a testament to a remainder in a slave, married and her husband died before the particular tenant for life; the widow then married again, and after the termination of the life estate, the contest arose between the executors of the first husband, and the second husband. Mr. Haywood in his report of this case, states that he was informed, that two judges decided in favor of the executors of the first husband. An opinion to that effect might have been given, but the case was pending afterwards, and came on before three Judges in 1799. Upon the supposition that it was so decided, the reporter questions its propriety, and introduces the following pertinent remarks: "The authorities upon which the decision is grounded will not support it. Neither will H. Bl., 538, (the authority now relied upon) for though a vested interest in remainder, was there held to vest in the husband, that was the case of a chattel real; and 2 Atkyns, 124, and the authorities cited in *Whitbie* v. *Frazier* prove that vested interests in the wife, not reduced into possession, do not go to the husband as such, but as next of kin to the wife, where

he survives her; whereas if they went to him as husband, because vested interests in the wife, there would be no occasion to claim them, nor indeed could he claim them as administrator of the wife. These negroes were but choses in action of the wife of the first husband, which he had never reduced into possession." When the same case was afterwards argued before three judges, it appears that no judgment was given in consequence of one judge not agreeing with the other two, who were clearly of opinion that the second husband was entitled to recover; and the reasons of their opinion appear to be in exact consonance with the quotation just made. Taylor's Reports, 44. The difficulty which has ever embarrassed the question, consists in ascertaining the true definition of a chose in action. For if slaves, of which the right is in the wife, although separated from the possession during the coverture may be considered as things in action, then it is conceded, and indeed cannot be doubted, that they do not survive to the husband as such. On the other hand if they are not choses in action, then they belong to the husband, who may, after his wife's death, sue for and recover them, as well as during her life time. In 2 Black., 430, chattels personal (or choses) in possession, are contra distinguished from chattels personal, (or choses) in action. As examples of the former, the author enumerates, not only money, but jewels, household goods, and the like. If these chattels, or any others that are the subject of property, are kept from the owner by an adversary possession, they must equally come within the definition of things in action, as debts upon bond, contract and the like. Is there any rational ground of distinction between a bond due to the wife and a chattel detained from her? Can a plausible reason be assigned why the husband should be deprived of one, if he fails to reduce it into possession during the coverture, and be entitled to the other? As the law confers upon him a power of obtaining an exclusive property in both, it seems most proper that he should be deprived of both, if he fail to exert such power. Such has been the opinion of this court on every case where the question has come forward. The administrators

of *Neal* v. *Haddock* is a direct decision to that effect, as well as a case from Wilmington, *M'Calop* v. *M'Calop*.

The law may therefore be considered as settled, so far as the docisions of this court have any weight in that respect; and as the property is peculiar to this contry, it is impossible to acquire additional information from the books to which we usually resort. But since the decision of the cases in this court, the report of a case in Virginia has been published, part of which is so applicable, as well to the general principle, as to the particular question made in this case, that we are desirous to state it at some length, for the satisfaction of those who have not the book to refer to.

William Rowley made his will in 1774, devising to Lettice Wishart and Catharine Taylor sundry slaves, together with the residue of his estate, subject to the payment of his debts and legacies. John Wishart and Richard Taylor, husbands of the legatees, were appointed executors, both of whom qualified, but Wishart principally acted, and worked the slaves on the testator's land. After the testator's death, Wishart made his will in 1774, and gave all his slaves to be equally divided between his two sons, William and Sidney, and his daughter the plaintiff; but the property was not to be enjoyed till his sons came of age. After the death of Wishart, the slaves of Rowley were divided between the defendant Lettice and Catharine Taylor, according to Rowley's will. Lettice Wishart, after the death of her first husband John, intermarried with the defendant Michael Wallace. The bill was brought by the daughter of John Wishart, claiming a proportion of the slaves under the testament. From this summary of the case, it appears that the very same question of law arrises out of the facts which has been so frequently litigated in this State; and it will appear in the sequel, that the application of the same principles which governed the decisions of this court produced the same result in the midst of the Judges in Virginia, all of whom are persons of more experience than we pretend to be, and possess more leisure and a better opportunity to investigate abstract principles of law. There is inthat State an act of the Legislature, the 4th clause

of which is in the following words: "and that where any slave or slaves have been or shall be conveyed, given or bequeathed, and have or shall descend to any feme covert, the absolute right, property and interest of such slave or slaves is hereby vested, and shall accrue to, and vested in, the husband of such feme covert; and that where any feme sole is or shall be possessed of any slave or slaves, the same shall accrue to, and be absolutely vested in, the husband of such feme, when she shall marry. Upon a superficial view of this clause it might appear that the slaves of the wife were meant to be vested in the husband without taking possession of them. This was one of the grounds of argument employed by the counsel claiming in behalf of the legatees under the will of John Wishart. But the court overruled the doctrine, and decided it as a point resting on common law principles. One of the Judges, after quoting at length the observations of Judge Blackstone, 2v., 433, proceeds thus, "This passage I shall hereafter refer to as giving the most modern and perspicuous explication of the doctrine on this subject, at present I only wished it to be remarked, that the personal property of a wife is said to be absolutely vested in the husband, at the same instant, that it is declared, that if he does not reduce them into possession during the coverture, they shall remain to the wife if she survives him. Here, then, is a decisive quotation, from an eminent and accurate writer on the common law, showing that the words, absolute property in the husband, are not to be construed as dispensing with possession in the case of chattels." Another argument in support of the first husband's right was, that by the rules of the common law, the gift of personal things to the wife during coverture, vests them abolutely in the husband, for which were cited 2 Com. Dig., 82; Bunbury, 188; 1 Roll. Rep., 134; 1 H. Bl., 109; 3 Lev., 803. This, however, was received by the President of the Court with much surprize, who declared that it was contrary to evey idea he had entertaied on the subject, and that on revising the cases cited, he could not discover the smallest reason to doubt but that

they prove a contrary doctrine. That they lay down the general position, that such a legacy devised to the wife, vests in the husband; but immediately explain how it vests, that is, subject to the conditions of his reducing it into possession, or making a disposition thereof in his life time, or surviving his wife; otherwise that it will survive to the wife. The same Judge observes, that in his long experience he does not recollect an instance, where the slaves of a feme covert or sole, when the right came to her, if they were not taken possession of by the husband during the coverture, and she survived, were not yielded to her. The case before the court at present, depends upon the question whether the wife can be joined with the husband in an action of detinue, instituted to recover a negro of the wife's detained before and at the time of the coverture? The property has never been possessed by the husband, and consequently would, upon his death, have survived the wife. It is a chose in action, which belongs to him only in the event ot his converting it into a chose in possession. If the wife die before this is done, the husband can entitle himself, not in the virtue of his marital rights, but in the character of her administrator.

Supposing these principles to be clear and sanctioned by authority, an analogy arises out of them which must be applied to the remedy. There is a system to be followed, and a harmony which cannot be disturbed without introducing confusion and injury to the rights of the citizens. It is laid down in all the books, as an universal principle, that where a chose in action of the wife is to be reduced into possession, and an action is necessary for that purpose, it must be brought in the names of the husband and wife. For as the right would survive to the wife, she ought to be joined in the remedy in order that she may prosecute the suit to judgment, in the event of her husband's dying before or if after judgment, that she may bring a *scire facias* thereon. 3 Term. Rep., 627. And if the cause of action will survive to the wife, then although it arise during the coverture, she ought to join. 1 Role., 347. 1, 49. But if the wife cannot have an action for the same cause, if she sur-

vive her husband, the action shall be by the husband alone. 2 Comyn. Dig., 107. To yield to the objection made to the wife's being joined in the present suit, would, it is conceived, overturn these principles. 1. Because it is manifest that if her husband died before he obtained possession, or at least judgment for slave, the right to recover it would survive to her. 2. Because, to say that the husband was competent to sue alone, would be to defeat her right without any consent or laches on her part; and by the lapse of time, to take away a privilege which the act of limitation has secured to feme coverts. Some dicta have been shewn from the books which seem to countenance the idea that the action of detinue for the wife's goods must be brought by the husband alone. But it is probable that if the original cases could be examined, it would appear that such actions by the husband alone were sustained only where the goods had been in his possession during the coverture, either actual or constructive. In that case the property is completely his own, and the right would devolve to his representatives upon his death, and would not survive to the wife. This is rendered likely by what is said in Viner, Title Beson & Ferne, 30. That the husband and wife may join in detinue for the wife's goods, bailed by the wife before the coverture. And so it is said with respect to replevin for her goods taken when she was sole.

In addition to this, it is to be remarked, that the action of the detinue hath, at least in this State, taken a range very wide of its original design, and been applied to transactions which were not formerly conceived to fall within its reach. It is defined in the old books as a remedy founded upon the delivery of goods by the owner to another to keep, who will not afterwards deliver them back again. Fitz. N. B., 323, and 2 Bl., 152, it is said that to ground an action of detinue which is only for detaining it, is a necessary point, among others, that the defendant came lawfully into the possession of the goods, as either by delivery to him, or by finding them. Hence it was that the wager of law was permitted in this action, and which grew out of the confidence reposed in the

bailee by the bailor. At present, however, the action is applied to every case where the owner prefers recovering the specific property to damages for its conversion, and no regard is had to the manner in which the defendant acquired the possession. Viewing the primitive use of the action, it is possible that a defendant claiming a chattel nnder the bailment of a wife when sole, might be considered as becoming on the marriage, a trustee for the husband: that the possession of the bailee was the possession of the husband, who therefore had a complete and exclusive right to bring the action. All this however fails in its application when the defendant claims an adverse possession under an adverse title, which happens in almost every instance. Then the husband is in pursuit of possession, the very thing which forms an indispensable ingredient in his title, and as he claims it in right of his wife, her name should be used in the action. For if brought by him alone, his representatives cannot revive it; for how can they recover that which their testator or intestate had no right in his life-time?

We shall conclude with the statement of a case made by the President of the Court of Appeals, in delivering his opinion on the case above cited. The material circumstances correspond entirely with the principal case. "Mrs. Harrison, when sole, was entitled to slaves which then lived with her mother, who upon one of them, a woman, misbehaving, sold her to Valentine, just before the daughter married. Harrison some years after the marriage brought detinue, in the names of himself and wife, to recover the woman and her children from Valentine, who pleaded the act of limitations. More than five years had elapsed from the marriage, but Mrs. Harrison was an infant at the sale, and the suit was within time after her coming of age. It was insisted for Valentine, that the act vested the right in the husband on his marriage; that he had improperly joined the wife; and that her infancy did not prevent his being barred. It was answered, that the act only vested it as a chattel, that it was still the wife's personal interest which would survive to her if not reduced into possession during the coverture, *and therefore that*

she was propesly made a party; and that the true question was, whether she was barred. The court was of opinion in favor of the plaintiff's, and gave judgment against Valentine, deciding in fact, that the right would survive to the wife, if not reduced to possession in the husband's lifetime. The very case now before the court. I believe there is no instance of an husband's suing under either part of this clause, in his own name, for his wife's slaves without joining her, except *Bronaugh* v. *Cocke*, and there the omission was made an objection."

For these reasons, we are of opinion that the wife was properly joined with the husband in an action of detinue brought to recover her slaves, which had not been possessed by him. Judgment for plaintiff.

NOTE.—On the first point, see *Norfleet* v. *Harris*, post, 517; *Walker* v. *Mebane*, 1 Murph., Rep., 41; *Armstrong* v. *Simanton*, 2 Murph., 351; *Spiers* v. *Alexander*, 1 Hawks, 67—and *Neale* v. *Haddock*, 2 Hay., 183, and the cases referred to in the note thereto.

On the second point, see *Charles* v. *Elliott*, 4 Dev. & Bat. Rep., 468.

JUNE TERM, 1804.

STATE v. GEORGE WILLIAMS.—Page 474.

Where there was an indictment for perjury on an affidavit to *continue a cause* and the defendant found not guilty, and then an indictment on the same affidavit *with intention to procure an attachment to issue;* it was held that the proceedings on the first indictment did not support the plea of "former acquittal" to the second.

The defendant was indicted in Salisbury Superior Court, at September Term, 1801, for perjury, committed by swearing to an affidavit, "with intention to continue a suit, the said George Williams then had pending in the Court of Equity for the said district, wherein he the said George Williams was plaintiff, and a certain John Simmons defendant."

The defendant being charged on this indictment, pleaded not guilty; and on the trial of the issue, was found *Not Guilty*.

The defendant was immediately indicted for perjury, in swearing to the *same affidavit*, "with intention to procure an attachment to issue against one Richard Pearson, Esq., from the Court of Equity for the district of Salisbury, for contempt." To this indictment the defendant pleaded, "Former acquittal for the same offence." To which the Solicitor General replied, *nul tiel record*.

Hall, J. One of the circumstances, requisite to constitute the offence of perjury, is, that the oath must be taken in a judicial proceeding. 4 Black. Com. 137. If this requisite is wanting—if it is not taken in some proceedings relative to a civil suit, or criminal prosecution, it does not amount to perjury. If an oath or affidavit is made in one suit, but is used in another suit, in which, when made, it was not intended to be used; it cannot in the suit, in which it was used, be considered as such an oath or affidavit, as that, if false, it would amount to perjury: because it was not made in that suit or proceeding; but it would be otherwise, if the indictment set forth truly, the suit or proceeding in which it was made. So it appears to me, that upon the same principle, if an oath or affidavit is made for one purpose in a judicial proceeding, but is used for another purpose, for which it was not taken, although in the same suit or proceeding, that an indictment for perjury, stating that the affidavit was made with the intention of being used for the purpose, for which it really was used, cannot be sustained. So in the present case, if the defendant's affidavit was made for the purpose of procuring an attachment to issue, &c., and not for the purpose of continuing the suit, the indictment which states that it was made for the purpose of continuing the suit cannot be sustained; because it does not set forth truly, that particular proceeding in which the offidavit was made, consequently there would be a variance between the true proceeding in which it was made, and the one stated in the indictment. Very material facts, may be inserted in an affidavit, as to the

purpose for which the affidavit may be made; but may become very material, as to some purpose for which the affidavit was not made, but to which it may be applied as occasion may require.

MACAY, TAYLOR and LOCKE, Judges, concurred with Judge Hall in opinion—that there was no such record of a former acquittal for the same offence.

NOTE.-See *State* v. *Ingles*, 2 Hay. Rep., 4; *State* v. *Williamson*, 3 Murph. Rep., 216; *State* v. *Lewis*, 2 Hawks, 98., *State* v. *Jesse*, 3 Dev. & Bat.,Rep.,98.

BUCHANNAN, DUNLAP & CO. v. KENNON.—Page 476.

A writ must be attested as well as signed by the Clerk of the Court, from which it issues.

By the Court. The question for the consideration of the court in this case, is, whether a writ attested in the name of National Lane, who was not Clerk of the Court, but which was signed by Simon Turner, who was the clerk' can be sustained. The defendant, by his attorney, having plead this defect in abatement, and the plaintiffs, by their attorney, having demurred to said plea.

The court are of opinion that the thirty-sixth section of the Constitution of this State, which states, "that all commissions and grants, shall run in the name of the State of North Carolina, and bear test, and be signed by the Governor; and all writs run in the same manner, and bear test, and be signed by the clerks of the respective courts," governs the present question. That this attestation is so substantiated and material a part of each and every writ, as to render all those abatable which do not contain such attestation. They are, therefore, of opinion that the demurrer to the plea be overruled, and the writ abated.

NOTE.-See *Dudley* v. *Carmolt*, 1 Murph. Rep., 339., *Shepherd* v. *Lane*, 1 Dev. Rep., 148, *Worthington* v. *Arnold*, Ibd, 363; *Gardner* v. *Lane*, 2 Dev. Rep., 53.

HOGG v. BLOODWORTH.—Page 477.

On a *sci. fa.* against a sheriff, issued on an amercement *nisi*, for not returning a writ to which the sheriff appears and pleads, the plaintiff is entitled to a trial at the return term of the *sci. fa.*

Sci. Fa. against the defendant as sheriff of the county of New Hanover, on an amercement nisi, made at April term, 1803, for not returning a writ directed to him, against James Richards and others, returnable to April term, 1803. This Sci. Fa. issued, returnable to October term, 1803, to shew cause why the conditional judgment, on the amercement of April term, should not be made absolute. At October term, 1803, the Sci. Fa. was returned, "made known," and the defendant by his attorney appeared and pleaded, "That he, the said Bloodworth, was prevented by sickness, from returning said writ," and moved the court for a general continuance, without shewing any cause, which was overruled by the court, and a jury impanelled to try the issue on the plea, which being found against the defendant, the court gave judgment for the plaintiff.

The question is, whether under the act of Assembly respecting *scire facias* on amercements against Sheriffs, the defendant is entitled to a general continuance on pleading as a matter of course, without shewing any cause therefor.

Hall, J. For every failure in a sheriff like the one now complained of, the court, by their order, may direct £—— to be paid to the party grieved, unless, says the act of Assembly, such sheriff can shew sufficient cause to the court, at the next succeeding term after such order. It is contended for the defendant, that if the sheriff being called in by sci. fa. enters his plea thereto, that he has, as a matter of right, till the next court, to procure testimony to support it. I cannot agree with that construction of the act; it expressly says, he shall have till the succeeding court after the order is made, to shew cause, act of 1777,

ch. 8, sec. 5. If he was not to shew cause, or make any defence at that court, the order would become absolute; that, and no other, is the court assigned him to make his defence. If he could not procure testimony, and was to make out a proper case for a continuance, the court would grant it. It is not like the case of a plea entered in a common suit; there time is expressly given till the next court by the act of Assembly, but that is not the case in the act that governs this question. He must either shew cause at the first court, or make out a proper case for a continuance till the next; but he cannot have that indulgence as a matter of course.

Macay, Taylor, and Locke, Judges, concurred in opinion with Judge Hall, that the verdict was regularly taken and ought to stand.

McLELLAN'S ADM'R v. HILL'S EX'R.—Page 479.

The act of 1715 (1 Rev., ch. 65, sec. 11) will bar a debt due on a bond, though there be no person entitled to sue.

This suit was brought to recover money due on bond executed before the war; and among other pleas, the act of 1715, ch. 48, s. 9, was pleaded in bar.

By the Court. The testator was bound to pay a debt to the intestate at a future day, before which both parties died, and no administration was taken on McLellan's estate till many years after the debt became due. The plaintiff now brings his action within seven years after administration obtained. The defendant pleads the act of 1715, ch. 48, s. 9; the plaintiff replies, and the defendant demurs.

The plaintiff insists that the term of seven years limited in the act, should only run from the time that he obtained letters of administration; that before that time, there was no creditor in existence, so that there was nothing for the statute to operate against; and that a creditor could not be bar-

red before he existed, and relied on the case Curry and uxor v. Stephenson, 4 Mod., 376, and Cary and uxor, probably the same case, 2 Salk., 421, and *Joliffe* v. *Pitt & Whistler*, 2 Vern, 695, comparing this to a case where the act of limitation is pleaded.

In the case *Curry & uxer* v. *Stephenson*, it is said the Judges were of opinion, that the statute would not bar the recovery on the *reasoning* in Saffyn's case, nor on the *decision*; for, in that case, the judgment of three Judges against two, was that the statute was a bar; but the case of *Curry & ux.* v. *Stephenson*, went off on another point.

In the case of *Saffyn* v. *Adams*, 2 Cro., 60, the case of *Sanders* v. *Stanford* is cited, and as there stated, is this: "It appears that there was a lease to commence on the expiration of a lease then existing; he who had the future interest died; the first lease expired; the lessor enters and levies a fine with proclamations, before any administration committed; the five years pussed; and after administration was granted, the question was, whether the administrator should have five years? And it was resolved that he should, "for none had a right to enter before." The same case is stated in the case of *Coates* v. *Atkinson*, Goldsborough, 171, somewhat different, as follows: "Stanfod's case was a lease to commence at a day future, and then a fine and non-claim before the commencement, shall not bar the right of that lease; but a fine after the day of commencement, although before any entry of lessee, shall bind," and cites Saffyn's case. The case of *Sanders* v. *Stanford*, is said to have been decided 21 Eliz.; but we have diligently searched all the reporters of that day, with a view to find a true state of it, without being able to find it. The case, however, of an executor, differs materially from all the cases cited. In the case *Curry & ux* v. *Stephenson*, first cited, the defendant actually recovered the money, and held it to his own benefit, without any legal right. It was a debt, in consequence, subject to the recovery of any person who could shew a legal claim; and he was under no obligation to part with it to any other person, therefore suffered no hardship by the recovery of the administrator.

In the case of *Sanders* v. *Stanford*, the lessor sustained no injury by the entry of the andministrator; the lease was his own act, of which he could not be ignorant, and he was bound in conscience to admit. An executor is only a trustee, and bound to deliver up the property with which he is entrusted, after the expiration of one year; being then divested of the property, he is no longer bound in conscience to pay any debt chargeable on that property; but notwithstanding this, the law obliges him to be accountable to creditors for seven years, and empowers him to demand security from the legatees, or next of kin, before he makes distribution or payment of legacies, to indemnify him against any legal recovery. This law, however, after seven years, bars the creditor from any recovery against him, therefore it would appear to a common observer, that no *legal* recovery could be had against an executor after the expiration of that term; more especially, as if after that time he holds any of the estate, not recovered by the next of kin, of legatees or creditors, he is bound to pay it to the church-wardens and vestry, for the use of the parish; and by a late act, passed April, 1784, chap. 23, the administrator, as soon as he has finished his administration, and no creditor makes any further demand, is bound to pay what remains in his hands, into the public Treasury; where it is to remain subject to the claims of creditors, &c., and the treasurer is empowered to compel payment of such residuum. This last act is called a supplement to the first, for the purpose of substituting the public treasurer in place of the church-wardens and vestry, which no longer existed; and to charge the public treasurer, instead of the executor, with any demands against the estate, which remained unsatisfied; so that it seems to be understood, that after a limited time the executor was to be exonerated, though the demand was not extinguished, but transferred to the public treasurer, to whom the executor was accountable. It is true, no time is limited by the last act, but as it refers to the first, the presumption is, that the Legislature had in view the time limited in the first. If he had anything in his hands, he was subject to a recovery by

the treasurer, and not by the creditor. If he had delivered over the property to the legatees or next of kin, he was answerable to no one, after the expiration of seven years; and it seems to have been the intention of the Legislature, from the tenor of these acts, that the executor should have a *quietus* with respect to creditors; for it could not be intended that he should be subject to the suits of the treasurer and creditor, at one and the same time. In the case of *Joliffe* v. *Pitt* and *Whistler*, it is said that the Lord Chancellor inclined to be of opinion, that the statute of limitation was not to take place; but the case was decided on the saving in the statute, 4 and 5 Anne, in favor of the plaintiff, where the defendant is *beyond sea*. Though we can find no decision directly in point, yet we believe the law has been generally understood, that the act of limitation will not run but from the time that administration was obtained, nor does this impose any hardship or injustice on the defendant, on whom there is a moral obligation to pay, notwithstanding any length of time that the debt might have become due; in case of an executor it is otherwise, for the moral obligation on him to pay, ceases whenever the assets are taken out of his hands, or when he is bound by law to deliver them to another. The laws are positive, without any saving in favor of this case.

Upon the whole, we are of opinion that judgment in this case should be entered for the defendant.

NOTE.—See *Jones* v. *Brodie*, 3 Murph. Rep., 594; *Rayner* v. *Watford*, 2 Dev. Rep., 338; *Godley* v. *Tailor*, 3 Dev. Rep., 178; *M'Kinder* v. *Littlejohn*, 1 Iredell's Rep., 66; *Armstead* v. *Bozeman*, 1 Iredell's Eq. Rep., 120—which seem to overrule this case.

RIDGE'S ORPHANS BY JÓNATHAN HAINS v. WILLIAM T. LEWIS, et al.—Page 483.

Where the notice was "at the house of Capt. A. *Gordoner*, on the 13th and 14th *days* of March next, to take the deposition of said A. *Gardner*; on the commission was "to cause A. *Gordan* to come before you"—between *Ridge's Orphans, by their next friend J. Haines, complainants, and W. T. Lewis and other defendants;* and the preamble of the deposition recited "to take the deposition of A. *Gordon*—wherein *J. Haines as the next friend of the orphans of W. Ridge is plaintiff, and W. T. Lewis and W. Corch and others*, are the defendants, at the house of the said A. *Gordon*," it was held that the deposition might be read.

If the notice be "at the court house in Jefferson, in the county of Jefferson;" and the commission is directed to "G. D.; P. T.; and H. B. Esquires; and the deposition appears to be sworn to "before us, two of the acting justices of the peace, for Jefferson county, at the court house for said county," it may be read.

A deposition taken under a commission directed to A. and B. Esquires, who certify it under their names with "J. P." annexed, may be read.

Where a notice is to take a deposition at the "dwelling house" of a witness, and the certificate states that the deposition of the witness was taken at "his own house," it is sufficient.

Exceptions taken to the reading several depositions, filed in this suit, while depending in the Court of Equity at Salisbury district.

Notice.—"At the house of Capt. Alexander *Gordoner*, on the 13th and 14th days of March next, in Oglethorpe county and State of Georgia, to take the deposition of said Alexander *Gardner*, Capt. John Fielder and others——."

Commission—"To cause Alexander *Gordan* to come before you—between Ridge's orphans, by their next friend Jonathan Haines, complainants, and Wm. T. Lewis, and others, defendants."

Preamble of Deposition—"To take the deposition of Alexander *Gordon*,——wherein Jonathan Hains as the next friend of the orphans of Wm. Ridge is plaintiff, and Wm. T. Lewis and Wm. Corch and others are defendants, at the house of the said Alexander *Gordon*."

Exceptions—"1st. The house at which it was taken, is

described Gordon's own house, not dwelling house, and is not said in what county.

"2d. The notice is to take Gardner's deposition, and the deposition taken is Gordon's.

"3d. The notice is for two days.

"4th. The suit is not the same in the commission and in the commission cited."

Commission—"To George Doherty, Permenus Taylor and Henry Bradford, Esquires, State of Tennessee and Jefferson county."

Notice—"At the court house in Jefferson, in the county of Jefferson, on the 22d and 23d days of Februrary next."

Deposition—Sworn to before us, two of the acting justices of the peace, for Jefferson county, at the court house for said county, this 22d day of February——."

Exceptions—"1st. Because the commission is not directed to justices of the peace, and the deposition appears to be taken by justices.

"2d. It does not appear that the deposition was taken at Jefferson court house, in Jefferson county.

"3d. The notice names two days, and the deposition was taken on the first."

Commission—"To James Dickson, Robert Edmondson, and Samuel Bell, Esquires, of Davidson county, and State of Tennessee.——Between Ridge's orphans, by their next friend Jonathan Hains, complainants, and Wm. T. Lewis and others defendants."

Notice—"At the dwelling house of James Martin Lewis, Esquire, in the county of Davidson——on the 30th and 31st days of December next."

Deposition—"Sworn to and subscribed before us at the house of said James Martin Lewis, Esquire, this 31st day of December, 1801, in the county of Davidson——."

Certificate—"We certify that we have taken the deposition of James Martin Lewis, Esquire, at his own house, in the county of Davidson, and State of Tennessee, on the 31st day of December, 1801. Samuel Bell, J. P.
James Dickson, J. P."

Exceptions. "1st. That the commission is not directed to Justices of the Peace, nor the deposition taken by Justices.

"2d. Two days are named in the notice, and so uncertain.

"3d. The notice is dwelling house, the deposition taken at his own house."

By the Court. The depositions are taken with sufficient certainty, and ought to be read; the exception, therefore, are Overruled.

NOTE.—See *Kennedy* v. *Alexander*, 1 Hay. Rep., 25; *Ellmore* v. *Mills*, Ibid, 359; *Alston* v. *Taylor*, Ibid, 381; *Harris* v. *Peterson*, 2 Car. Law. Repos., 471; *Bedell* v. *State Bank*, 1 Dev. Rep., 483.

WADE v. WADE.—Page 486.

To an action of debt on the judgment of a court of record in a sister State, *nil debet* is a bad plea; it should be *nul tiel record.*

B. Wade brought an action of debt in Stokes County Court against J. Wade, on a judgment obtained in a court of record of another State in the Union: The defendant pleaded the "general issue." The issue was submitted to a jury, and a copy of the record, authenticated according to the act of Congress, being to read them, they found a verdict for the plaintiff, "that there was such a record;" and judgment was rendered by the court for the plaintiff accordingly.

J. Wade obtained a writ of error, and assigned for error, that the general issue in this case is, *nul tiel record*, which ought to have been decided by the court, and not by the jury.

HALL, J. It is declared in the 4th article of the constitution of the United States, that "full faith and credit shall be given in each State to the public acts, records and Judicial proceedings of every other State; and Congress may, by

general laws, prescribed the manner in which the same shall be proved, and the effect thereof." The act of the first Congress, 2d session, ch. 11, in conformity thereto, after pointing out the manner in which records, &c., shall be authenticated, declares, "that records, &c., so authenticated, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from whence they may be taken. The record of a judgment obtained in another State is plainly comprehended in the words and meaning of the constitution, and the before-recited act of Congress. It was, therefore, clearly intended to place them on a different footing from that on which they stood, or from that on which they would stand, in case no such provision existed. The record of the judgment in question is entitled to the same faith and credit in the court, as it is entitled to in the courts of the State from whence it came. In those courts I apprehend, the plea of *nil debit* would not be admissible; if so, it is equally inadmissible here. This proves, that such judgment cannot be considered in the light of a foreign judgment. This point appeared so plain in favor of the plaintiff, in the case of *Armstrong* v. *Carron's ex'rs*, 2 Dallas Rep., 302, that the counsel for the defendant declined arguing it. See also *Phelps*, et al. v. *Halker*, et al., 1 Dallas Rep., 261.

The judgment which the Court gave in this case, was a general judgment upon the verdict, not a direct one upon the record, which ought to have been the case. I therefore think the judgment must be reversed.

MACAY and TAYLOR, Judges, concurred in opinion with Judge HALL, that the judgment of the county court be reversed.

LOCKE, J., having been concerned as counsel in the cause, gave no opinion.

NOTE.—See acc *Carter* v. *Wilson*, 1 Dev. & Bat. Rep., 362; *Knight* v. *Wall*, 2 Dev. & Bat. Rep., 125.

CHARLES REID, Surviving Partner of D. Campbell & Co. v. ROBERT HESTER'S ADM'RS.—Page 488.

It is discretionary with the court to allow the plea of *plene administravit* to be entered after issue joined, or not, under the circumstances of the case.

The plea of the statute of limitations may be pleaded after issue joined, upon payment of full cost, under peculiar circumstances.

An action of debt brought by plaintiff, a British subject, returnable to Granville County Court, August sessions, 1798, to recover a debt due by bond executed to Duncan Campbell and Company, by Robert Hester, on the 13th day of March, 1777. The defendants plead "payment at and after the day, and set-off." Whereupon the cause was continued from term to term, until May Term, 1800, when they moved for leave to plead the act of 1715, they having qualified more than seven years before the commencement of the action. The motion was founded on an affidavit, which stated, "That it never was the intention of the defendants to abandon or relinquish any legal defence they had to this suit; that when they employed counsel, they did not know that there was any statute of limitation in force in this State, which would bar the plaintiff's action, or they would certainly have made use of it; and that they had, by order of the said court, paid out part of the assets to one of the distributees."

The motion was immediately argued and overruled, from which decision the defendants prayed an appeal, and moved the cause to Hillsborough Superior Court. The motion was again argued in that court at October Term, 1800, and over-ruled by Judge TAYLOR. At October Term, 1802, Judge TAYLOR again presiding in that court, the defendants moved for leave to add the plea of *plene administravit*, to which, the Judge being dissatisfied with his former opinion, added the act of 1715, and granted a rule on the plaintiff to shew cause and ordered the rule to be transmitted to this court for the opinion of all the Judges.

By the Court. The plea of the statute of limitations in the affidavit mentioned, having been over-ruled at October Term, 1800, this court cannot take any cognizance of that plea; and as to the plea of plene administravit, the defendants having shewn no good cause for their being permitted to enter that plea, at this stage of the proceeding, this court leaves them to make out such a case, as may entitle them to such a plea, at the discretion of the Judge, before whom the cause may be tried—And remanded the cause.

At October Term, 1803, the cause was put to the jury, and a verdict entered for the plaintiff. The counsel for the defendants then suggested, that the opinion of the Court of Conference was founded on a mistake; the right of adding the plea of the act of 1715, having never been decided on by that court, as intended by Judge TAYLOR, when he granted the rule of October, 1802. It was, therefore, ordered that the same rule should be again transmitted to the Court of Conference, and that the verdict taken at this term should be subject to their opinion thereon.

By the Court. The court considers that the question, as to the plea of fully administered, has been settled in this cause in this court, heretofore. The plea of the statute of limitation is permitted to be entered, under the circumstances of the case, upon payment of full costs. 1 Wils., 177; 3 Term, 124; 1 Bofanq., 228.

NOTE.—See on the first point, *Woolford* v. *Simpson*, 2 Hay. Rep., 122, and the cases referred to in the note. On the second point, see *Johnston* v. *Williams*, post, 518; *Hamilton* v. *Shepherd*, 2 Car. Law. Repos., 471.

ERWIN and wife v. ARTHUR'S EX'RS.—Page 490.

Where upon the hearing of a cause by petition for an account in the County Court, the court ordered an account to be taken by an auditor, upon the coming in of which exceptions were filed by the plaintiff, which being argued and over-ruled, the plaintiff appealed, *it was held* that the Superior Court would begin with the exceptions and not to hear the cause first upon the petition, answers and proofs, though possibly it should not stop with the hearing on the exceptions.

Petition to the county court of Mecklenburg, for a residuary legacy, given to the plaintiff, Mrs. Erwin, by the last will of Robert Arthur, her deceased father.

The defendants put in their answers, to which the plaintiffs replied, and several depositions were taken ; and on the hearing, the county court ordered an account of the estate of the testator to be taken, by an auditor to be appointed by the court. The auditor took the account and made his report, whereby he stated a balance to be due to the defendants. The plaintiffs excepted to the report, and the exceptions were argued and over-ruled. And thereupon the plaintiffs appealed to the Superior Court.

The question is, whether shall the Superior Court, acting on this appeal, proceed de novo, hear the petition, answers and depositions, and if necessary, refer the cause again to an auditor to take an account, as is contended by the counsel of the plaintiffs; or shall that court begin at the exceptions, have them argued, allow or disallow them, and overturn or confirm the report accordingly, as defendant's counsel contends ?

If the court shall be of opinion to begin at the exceptions, then the plaintiff's counsel wish to add others; shall they be permitted to do so, with or without costs ?

By the Court. The foundation of the appeal is the judgment rendered by the county court, in over-ruling the exceptions taken by the plaintiffs. This is the error he complains of, and the one for which he seeks a remedy in moving the cause up. The obvious, and the natural course, there-

fore, is, for the Superior Court to examine in the first place, whether those exceptions are well founded, and consequently, whether the county court did right in over-ruling them. Though this is the point where they ought to begin, in the further progress of the cause, yet we cannot undertake to say, that it is the one where they ought to stop; for the justice of the cause may require that they should proceed, and give such judgment as the county court ought to have given, in the event of the cause having remained there. We say, "may require," because it would be equally impossible, and improper, to prescribe any rule for their ulterior decision.

NOTE.—See *Burton* v. *Sheppard*, 1 Hay. Rep., 399.

ROBERT RAY'S EX'RS *vs.* GEORGE McCULLOCH.—Page 492.

When a person agreeing to sell lands, had a good title, and was able to convey at the time of the bargain entered into, and no delay can be imputed to him in performing his part of the contract, the contract is considered in equity as *then* executed, the subsequent conveyance being only matter of form, the substance being the bargain.

A person, who had been one of the objects of the confiscation acts, was held he entitled, under the treaty of 1783, as a British subject, to recover the balance due on contracts made before the acts of confiscation.

Case agreed, filed in the Court of Equity for Hillsborough district for the purpose of settling the equitable rights of the parties concerned in this, and similar cases.

The case states, that Henry E. McCulloch, by his agent duly authorized, on the 6th day of February, 1767, contracted to sell and convey in fee simple, two hundred acres of land, lying in Orange county, to Robert Ray, the testator; for which the said Robert agreed to pay the said Henry, £72; and to secure the payment thereof, gave the said Henry his bond, who at the same time executed to the said Robert, a bond conditioned to convey to him the said land, when the

aforesaid £72 should be paid, and put the said Robert into possession of the said land; who remained in possession of the same till his death, and his heirs have continued in possession thereof ever since. Nothing further was done in execution of the contract, before the passage of the act of confiscation, in which the said Henry was named. On the 14th day of October, 1792, George McCulloch, being duly authorized and empowed, by the said Henry, executed to the said Robert, a deed, sufficient in legal form, to convey to him the said land in fee simple; and at the same time, delivered up to the said Robert, his bond given as aforesaid; and the said Robert executed to him a bond for the penal sum of £222 2s. 3d. conditioned to be be void on the payment of £111 1s. 1d. with interest from the date. The said Robert died soon afterwards; and the said George instituted an action of debt in Hillsborough Superior Court of Law, against the complainants, on the bond executed to him as aforesaid, which is still depending. The Trustees of the University, by virtue of several acts of the General Assembly, claim the said land, as escheated or confiscated, and have given notice to the complainants accordingly.

If the said George is entitled to the money mentioned in the condition of the last bond, he may proceed at law; but if he is not, an injunction absolute and perpetual is to issue.

By the Court. The question is, will the Court of Equity interfere to prevent the defendant from recovering at law on this bond.

It is insisted by counsel for the plaintiffs, that H. E. McCulloch's lands are confiscated by act of Assembly, therefore he cannot convey, and that the consideration of the bond has failed, therefore the plaintiffs are not bound to pay.

1st. It is to be considered whether the plaintiffs interest which he had acquired under the false from H. E. McCulloch, was affected by the act declaring the lands of H. E. McCulloch, confiscated and forfeited.

At the revolution, the property of the land, within the bounds of the State, was vested in the community or citi-

zens at large, saving the rights of individuals, thus the title and possession of the lands in this State were irrevocably fixed, and so far as respected individuals, beyond the control of any future law, which the legislature, then established, might thereafter enact; and a line was then drawn between the public and private property, never thereafter to be violated. By this instrument then, Ray's possession to the lands which he held under the contract aforesaid, was secured to him forever—what more was necessary for him? We are therefore of opinion, that Ray's interest was not affected by any of the acts of Assembly.

2d. Is Ray bound to pay the money stipulated by him at the time of the sale, and if he is bound to pay it, who has a right to demand it? It is said that H. E. M. not having conveyed the legal title, as he had stipulated, he is not entitled to the consideration.

M'Culloch was to convey when Ray paid or tendered the money; but it does not appear, that Ray ever paid or tandered the money, as he might have done, therefore there was no breach on the part of M'Culloch. But it is said that M'Culloch, by his own act, has disqualified himself to convey the estate. To this there are two answers.

1st. Nine years, or thereabouts, had elapsed, before any inability was attached to M'Culloch, in all which time, Ray might have had a conveyance, on tendering or paying the money.

2d. It does not appear, that M'Culloch was disqualified by any act of his own, but by an act of the State, which he could not control; it is true, that he might, within a limited time, by taking the oaths of allegiance to the State, become entitled to the privileges of a citizen; but as he was then resident in his native country, under the government of his lawful sovereign, then at war with this country, this measure might have been attended with difficulty, and a considerable degree of hazard; and his not having availed himself of this indulgence, was certainly no offence against the State, nor a breach of any law, either human or divine. We are therefore, of opinion,

that H. E. M'Culloch is not chargeable in equity, of any breach of the contract on his part, and that Ray is bound at law, and as it appears to us, not less in equity, to pay the consideration. But it is contended that this payment should be made to the State, in whom the legal estate is supposed to be vested, and who alone can convey it.

To this it is objected by the counsel for the defendant, and it appears to the Court that the objection is well supported. By the authority cited from 2 Powell, 70, on executory contracts, where, after citing a number of cases on the subject, he draws this conclusion: "But the true principle seems to be, that, in Equity, if the party agreeing to convey, have a good title, and be able so to do at the time of the bargain entered into, and be clear from the imputation of delay in performing his part of the agreement, the contract is *there* considered as *then* executed; the subsequent conveyance being only matter of form, the substance being the bargain." This appears to come fully up to the present case.

1st. M'Culloch, the party agreeing to convey, had a good title, and was able to convey at the time of the bargain entered into.

2d. It does not appear that any delay was imputed to him in performing his part of the contract.

The 4th section of the treaty with Great Britain, respecting British creditors, is likewise relied on by the counsel for the defendants. This proves that whatever claim the State may have to the lands of British subjects, it can have none to the debts due to them. This appears to us, to be a *bona fide* debt due to a British subject, contracted before the revolution, on an equitable consideration; for we consider the new bond taken by George M'Culloch in the same condition as that given to Henry Eustace M'Culloch, it being founded on the original contract, and for the same consideration. We would ask, what has the State to give in return for this money? It must be answered, nothing which can be useful to Ray; any conveyance which the State can make to him, will not put him in a better condition than he is at present; the State would, therefore, receive the money without any

valuable consideration; the most it can pretend to, is a mere naked right without an interest.

It might be observed, that the claim of the University, to the land is barred by the possession which Ray holds under the conveyance from George M'Culloch, which is of more than seven years continuance.

Thus it appears to us, that Ray's right to the land is secured by the constitution and act of limitation; M'Culloch's right to recover the money, is secured by the 4th article of the British treaty; that, therefore, the money must be paid to M'Culloch, from whom the consideration was received—or to no one.

Upon the whole, we are of opinion, that Ray having on his part, received the full benefit of his contract with M'Culloch, he has no equitable claim on the interference of this Court, to screen him from a discharge of his part of the contract, and that being in possession of the *substance* he may remain indifferent with respect to the form or shadow. Therefore that no injunction issue, and the bill be dismissed with costs.

NOTE.—See on the second point, *McNair* v. *Ragland*, 1 Dev. Eq. Rep., 516.

DEN ON DEM. OF THE TRUSTEES OF THE UNIVERSITY v. THOMAS RICE.—Page 497.

Where a deed in trust of land was made to a firm, consisting of several partners, some of whom afterwards became subject to the confiscation laws, but one of them did not; *it was held* that this one was adequate and competent to hold the land and execute the trust.

This was an action of ejectment brought to recover a tract of land lying in the county of Granville. On the trial the jury found a special verdict, in substance, so far as is material to the questions of law, intended to be submitted to the court, as follows:

James Currin being seized in fee, of the land in question, and indebted to Young, Miller & Co., in a large sum of money, on the first day of December, 1772, in consideration of the said debt, and of the further sum of five shillings to him paid, conveyed the said land to Young, Miller & Co., in trust, to secure the said debt, and to be sold by them for the payment thereof. That the persons constituting the firm of Young, Miller & Co., were John Alston, James Young, James Morton, Alexander Grindley, Andrew Miller, William Littlejohn, and George Alston; that the said J. A., J. Y., J. M. and A. G., were on the 4th day of July, 1776, subjects of his Britannic Majesty, and still are subjects of the King of Great Britain; that the said George Alston, and Andrew Miller, withdrew themselves from this State, in the year 1774, and removed beyond the limits of the United States, and continued beyond the limits of the said States, until after the year 1783; and that the said William Littlejohn is, and always since the 4th day of July, 1776, has been a citizen of this State.

1st. Whether the land in question, or any part thereof, vested in the State of North Carolina by the Declaration of Independence and the event of war, or by the acts of Confiscation?

2d. Whether the debt stated in the record, is restored to Young, Miller & Co., by the treaty of 1783; if so, is the land, being the security for the payment of that debt, reverted in them to the uses mentioned in the deed?

3rd. Whether a naked trust, on the failure of a trustee, vests in the State, or in the *cestui que trust*?

4th. If on failure of a trustee, a trust coupled with an interest vests in the State, and that interest is afterwards restored to the individual, will the legal title pass with it?

By the Court. This case coming up from a court of law, but the counsel concerned having consented that the Court shall judge of this case in the same manner as they would do in a court of equity, they are therefore of opinion, that according to the principle which prevails in courts of equity, that the act of a trustee shall not prejudice the *cestui*

que trust, who is in that court the owner of that estate; that no confiscation has been operated in the present instance. Although the other trustees became disqualified, by the act of confiscation, in leaving the country, yet the competency of Littlejohn remained, and he was adequate to all the purposes for which the trust was created. Even had all the trustees become subject to the confiscation laws, yet, according to the principle established in the Moravian cause, the State would have taken the land encumbered with trust. We think that as trust estates, are the mere creatures of the Court of Equity, and by them so moulded as to obtain the ends of justice, any other construction in the present case, would be irreconcilable with the general doctrine on that subject.

MILLISON, Adm'r of William Howell v. JAMES NICHOLSON.—Page 499.

A husband suing as administrator of another for slaves, is not estopped by the deed of his wife, made while sole, conveying the said slaves to the defendant.

A husband may show the insanity of his wife before coverture to avoid a deed made by her whilst in that state of incapacity.

Detinue for slaves. The case states that William Howell, the intestate, being possessed of the negroes in question, for the consideration of love and affection, made a bill of sale of them to Sarah Howell, his sister; which was attested by the defendant. Sarah Howell afterwards lived in the family of the defendant, and while there, being sole, in consideration of love and affection, made a deed of gift of the said negroes to the defendant, with warranty of the tile, he being in no manner related to her. The plaintiff some years after the said deed of gift was made, intermarried with Sarah Howell; obtained administration on the estate of William Howell, who died in the interim, and commenced

this action. It was alleged, and proved by the plaintiff, on the trial, that William Howell was an idot; consequently, the deed made by him to his sister, void; and his administrator entitled to recover the negroes. On the part of the defendant, it was objected, that the plaintiff having intermarried with Sarah Howell, was bound, and estopped by her warranty to the defendant. To which the plaintiff answered, that he sued as administrator, and not in his own right, and that Sarah Howell was also an idiot, and offered evidence to prove her insanity at the time she executed the said deed, and that the defendant had by cover and fraud obtained the same. The court rejected this evidence; the plaintiff was non-suited, and obtained a rule on the defendant to shew cause, why the non-suit should not be set aside, and a new trial granted.

Macay, Taylor and Locke, J's. The circumstances of this case are somewhat singular, and as the questions it involves, have not formed the subject of any judicial decision, that is recollected, in this State, it may be useful to state the principles of law, as we apprehend them, with some degree of minuteness. For, when the grounds of a decision are precisely ascertained, there is less danger of misapplication of its authority as a precedent, or of its extension to cases, which do not according to just analogy, range within its influence.

It is a fact stated in the record, that William Howell was an idiot. As such he was incapable of giving that free and deliberate assent, which forms the essence of a contract; and the law has declared, that all deeds, not of record, made by persons labouring under this mental infirmity, with a view to transfer their property, real or personal, are absolutely void. The exception, as to deeds of record, can have no operation in this State, where there is no method of levying a fine or suffering a recovery. The plaintiff's right to shew the incapacity of his intestate, cannot be disputed, for privies in blood, as the heir, may shew the disability of the ancestor, and privies in representation, as the administrator, that of the intestate. 4 Co., 124. The law will therefore permit the

plaintiff's recovery, unless he is barred by the deed with warranty, executed by his wife, when sole, to the defendant. It is however an additional circumstance in the case, that the wife of the plaintiff was under a similar disqualification with her brother, to make a deed: The questions therefore to be considered are,

1st. Whether the husband may shew the idiocy of his wife before coverture in order to avoid her deed?

2nd. Whether the husband is barred by the warranty of the wife, under the circumstances of the case?

Previously to considering the first question, it may be premised that, the terms "idiot" and "insanity," are indiscriminately applied to the wife, in the case sent up; though, if by the latter, he meant lunacy, a material legal difference exists between them. An idiot is one that hath had no understanding from his infancy, and therefore is by law presumed never likely to attain any. 1 Bl., 302. A lunatic is one who hath had understanding, but by disease, grief, or other accident, hath lost the use of his reason. A lunatic is, indeed properly, one that hath lucid intervals; sometimes enjoying his senses, and sometimes not. Ibid., 304. The same writer, lays down the principle, that consent is absolutely necessary to matrimonial contracts, and neither idiots nor lunatics are capable of consenting to anything. Ibid., 438. It is presumed however, that the meaning of this passage is, that the former are incapable of consenting at all times, but that the latter may consent to in a lucid interval, and consequently, can, in that state, contract matrimony; for the writer proceeds to observe, "And modern authorities have adhered to the reason of the civil law, by determining that the marriage of a lunatic not being in a lucid interval, was absolutely void." But as the validity of Sarah Howell's marriage is not made a question upon the record, and as the equivocal use of the terms preclude any precise inference, no opinion will be given on that point. These remarks are therefore made only with the view of shewing that the circumstance has not been overlooked; and to explain, what might, on a slight examination of the case,

be constructed as giving an implied sanction to the marriage of a person legally disqualified. With respect to the question itself, the maxim relied upon is, that no man shall be suffered to stultify himself, in support of which so many cases have been cited and referred to, as strongly tend to create a belief, that the current of authorities sets that way. As a rule of law established by many adjudications, we do not mean to infringe it, but in our view of this case, it becomes necessary to examine the foundation on which it rests, in order to shew that neither the authority of the cases, nor the immutable principles of justice, warrant its further extension, or more rigorous application. No rule is more clearly deducible from natural justice, than that an obligatory contract cannot be made by a person devoid of understanding to direct his actions. Freedom and intelligence constitute a moral agent, without which facilities, a person is incapable of producing by his acts, any moral effect. Infants, idiots and madmen, are equally unendowed with this moral agency, and are consequently alike incapable of making a valid contract. The principle is received into the code of all civilized nations. It is even admitted, in its full force, by our law, which however creates an artificial distinction between the modes in which the contracts of incompetent persons are to be nullified. An infant may alledge and prove his infancy: a non compos cannot do so, because, say the books, great insecurity would arise to contracts, from counterfeit madness and folly; and, supposing it to be real, a man cannot know what he did in such a situation. Influenced alone by such reasoning, the law has continued to enforce the maxim down to a late period, from the time of Edward 3d. Before the latter period however, the adjudications were directly opposite. This is rendered manifest by the Registrum Brevium, in which there is a writ for the alienor to recover lands conveyed by him, while he was of unsound mind; by the authority of Britton, who asserts that a man might allege his own insanity; and by that of Fitzherbert in his *Natura Brevium*, whose words are so emphatical as to leave no doubt of his real opinion of the law at the time he composed

his book. "It stands with reason that a man should shew how he was visited by the act of God with infirmity, by which he lost his memory and discretion for a time. As if an infant within the age of twenty-one years, doth make a feoffment in fee or a lease for years, he himself shall avoid his feoffment or lease, as well within age, although he shall not have a *dum fuit infra ætatem* within age, because the writ doth suppose him to be of full age; but an infant of the age of fourteen years hath discretion, as hath been adjudged, at such age; and if he at such an age commit felony, he shall be hanged for the same, and yet his feoffment, lease or grant shall not bind him before the age of twenty-one years, because he hath not perfect discretion or knowledge of what he ought to do, or what is to his profit or advantage before such age; and therefore he shall alledge, that he was within age at the time of the feoffment, grant or lease made by him; by which it appeareth, that he shall alledge, that he had not perfect discretion at that time, for that non-age is an infirmity of nature, and cometh by the act of God, and *a fortiori*, then, he who is of non-sane memory, shall allege, that he was not of sane memory at the time of his feoffment or grant; for he who is of unsound memory hath not any manner of discretion, &c.,

The degree of credit to which these books are entitled, may be best estimated by considering what is their character and pretensions, and we can thus more fairly draw a comparison between them and the others by which they are contradicted. The first book cited, is supposed by some writers to be the oldest in the law, and must at least be considered as containing true precedents of such writs as were used at the time of its publication. It was printed, probably for the first time, in the year 1531, about sixty years after the art of printing was introduced into England, and may perhaps be considered as good evidence of what the law then was, as the loose dicta to be collected from the year books. Britton is a writer highly esteemed, considering the period in which he wrote, and has the reputation of conveying the doctrines of the law in a precise and satisfactory manner. It is almost superfluous to

remark of Fitzherbert, that he was a profound and accurate judge; whose laborious and intelligent researches, in the time of Hen. viii, imparted methodical arrangement and luminous order to many branches of the law. His work, from which the above extract is made, contains a selection of such writs from the Registrum Brevium, as had not become obsolete in his time. For the particular doctrine he advances relative to this case, he is warranted by the authorities he cites; and although he has since been overruled in *Stroud* v. *Marshall*, Cro. Eliz., 398, yet his reasoning still retains whatever cogency it originally possessed. Having been sanctioned by some of the greatest modern lawyers, it cannot be considered altogether inconclusive. Judge Blackstone observes thus, "And from these loose authorities, which "Fitzherbert does not scruple to reject as contrary to reason, "the maxim that a man shall not stultify himself, hath been "handed down as settled law; though later opinions feeling "the inconvenience of of the rule, have in many points endeavoured to restrain it." Vol. 1 Pa., 191. No direct judicial decision, confirmatory of the maxim, hath occurred of a later date than Jac. 1, nor is it probable that it would now receive a deliberate sanction; indeed there is a good ground to infer the contrary, from such indications as modern opinions furnish. For in *Yates* v. *Boen*, Strange's Rep., 1104, in an action of debt upon articles, the defendant pleaded *non est factum*, and offered to give lunacy in evidence. The Chief Justice first thought it ought not to be admitted, upon the rule that a man shall not stultify for himself; but on the authority of *Smith* v. *Can*, where Chief Baron Penjelly in the like case admitted it, and on considering the case of *Thompson* v. *Leach*, in 2 Ventris, 198. (Reported also in 3 Mod., 301,) he suffered it to be given in evidence, and the plaintiff, upon the evidence, was non-suited. These cases completely justify the assertion of Judge Blackstone. The same sentiment is avowed by Lord Mansfield in the House of Lords, in discussing a question brought up on a writ of error to one of the inferior courts. His language is equally forcible and apposite: "It hath been said to be a maxim, that no man can plead his being a lunatic to avoid

a deed executed, or excuse an act done at that time, because it is said, if he was a lunatic, he could not remember any action he did during the period of his insanity. And this was doctrine formerly laid down by some Judges; but I am glad to find it hath since been exploded; for the reason for it is, in my opinion, wholly insufficient to support it; because though he could not remember what passed during his insanity, yet he might justly say, if he ever executed such a deed, or did such an action, it must have been during his confinement or lunacy; for he did not do it either before or since that time. As to the case in which a man's plea of insanity was actually set aside, it was nothing more than this: It was when they pleaded *ore tenus;* the man pleaded that at the time he was out of his senses. It was replied, how do you know you was out of your senses? No man that is so, knows himself to be so. And accordingly, upon this quibble, his plea was set aside, not because it was not a valid one, if he was out of his senses, but because they concluded he was not out of his senses. If he had alleged, he was at that time confined, being apprehended to be out of his senses, no advantage could have been taken to his manner of expressing himself." Appen. Bl., 150.

Those who vindicate the maxim on the ground of public policy, seem to consider that the success of the plea depends on the testimony of the party relying upon it. But as it must be established by indifferent testimony, like any other fact, the truth is equally capable of being ascertained. And how slight is this probability, either that men should feign lunacy, when they make contracts, in order to avoid them afterwards; or if they were so disposed, that they could do it so successfully as to impose on the by-standers. Supposing it to be assumed with a degree of plausibility calculated to deceive the witnesses, and to impress them with a belief of its reality, the party contracting must then entertain the same opinion; and believing himself to be contracting with a person of unsound mind, he must have some dishonest views, and ought not to receive the assistance of the law in enforcing such a contract. But why enforce the

contract of a real lunatic, lest men should be tempted to feign lunacy, when even the former may be set aside by his committee, from the time he is found to have been *non compos*? The fact upon the inquisition, is not more deliberately examined, nor likely to be more accurately determined, than where it constitutes the defense of a suit, and must be tried by the jury. To ascertain the intentions of men, their actions must be resorted to in a multitude of instances; there is no other way of exploring the operations of the heart. Whether the understanding be vitiated, seems to be a question upon which a jury may receive more complete satisfaction, than on many others presented to them where they have to mark the fine discrimination of intention. Insanity, it is true, may be assumed, while infancy and duress cannot: but the bare probability that the deception should succeed, throughout all its stages, does not form a reason strong enough to sanction a principle so repugnant to natural justice.

The maxim then stands supported by various authorities, yet opposed by some that are very respectable, contained in the elementary books, as a principle of law, but the subject of reprobation with those by whom it is taught; rejected by individual judges, before whom it has occurred, and treated with entire contempt by one of great eminence, in a most important judicial investigation. It may at least be drawn from this view of the subject, that the maxim ought not to be strained beyond its proper limits, to govern any case not falling within the latter. The case before the court is apprehended to be of that description; for the husband does not seek to allege the incapacity of his wife when sole, in order to annul a contract by which he is personally bound, but one set up to repel a claim made by him as the representative of a deceased person. Such an act of the wife can bear no relation to the character in which the husband now appears, nor could insanity have been feigned by her with a view to enable the husband to escape from the contract now opposed to him. In this respect, therefore, the husband ought to be allowed to make any objections to the contract of the wife,

which he might properly allege against those of a stranger. And there seems to be as much propriety in this, as in a committee shewing the insanity of a lunatic in order to avoid his contracts. From these reasons, we are induced to think that the evidence offered by the husband, ought to have been received. As to the second question, it must be repeated, that the husband sues in another right, and can therefore, be repelled only by transactions which have proceeded from him in that character. It is for the sake of preventing circuity of action that the law will not allow the recovery of a plaintiff against whom the defendant might afterwards effect a similar recovery. Wherever this principle operates, there will be found these two circumstances in the case, equality with regard to the amount and identity in respect to the character. As if a man covenant that he will not sue without any limitation of time. This the law construes a defeazance or absolute release, in order to avoid circuity of action. For, if in such case, the party should, contrary to his covenant, sue, the other party would recover precisely the same damages which he sustained by the others suing. 4 Bac., 266. There the two circumstances concur; the covenant was given by the plaintiff in his proper character, in which also the suit was brought; and the recovery against him would have been measured by the amount of his against the covenantee. One of the ingredients occurs in the following case, which however being deficient in the other, was held for that reason not to amount to a bar. In an action of waste it is no bar that the plaintiff covenanted to repair: for, in waste, the plaintiff shall recover treble damages: in covenant, only single are recovered. Moore, 23. The principle is also illustrated in the following cases: If a feme obligee marries the obligor or one of the obligors; or if there be two feme obligees and one of them marries the obligor; these are releases in law. But if a woman, executrix of the obligee, take the debtor to husband, this is no release in law, because she hath the debt in another right. 8 Co., 136. So in the present case, as the husband is suing for those negroes in another right, the acts of his wife before

marriage ought not to prevent his recovery. It cannot, upon any principle of justice, be considered stronger against the husband, than if it were a debt of the wife's contracted before marriage. Yet suing in the character of administrator, such a debt could not be set up as a bar to the action; nor could even a debt of the husband's own contracting. 3 Atkyns, 691. And although the law has established the general liability of the husband to the bebts contracted by the wife when sole, yet there must be some acknowledgment on his own part, to render such a debt a bar even to an action brought in his own right, as the following case evinces. "This was an action of assumpsit for money, and goods sold and delivered. Plea, non assumpsit, with notice of sets off. The articles contained in the sets off were three several sums of money which were stated to have been paid by the defendant for the plaintiff, and by his direction; one of them was a sum of six guineas, stated to have been paid to a Mrs. Grandy, which the plaintiff's wife who was a sister of the defendant, owed her for lodging before her intermarriage with the plaintiff. The counsel for the plaintiff objected to the allowance of this sum in the present action, on the ground that this was an action by the husband alone, and the debt attempted to be set off was a debt due from the wife before marriage, for which the action should be against husband and wife. It was answered that the husband having ordered the money to be paid had thereby made the debt his own. Eyre, C. J., said, 'that for a debt of the wife *dum sola*, the action must be against husband and wife, and therefore could not be set off against a claim made by the husband alone, and for which the action was brought; but if it appeared that after the marriage, the husband had ordered the debt to be paid, he thereby made it his own, and it could be set off. The defendant proved that the husband had done so, and was allowed the sum in his set off." 2 Esp. Cas., 594. The very principle employed to contest the plaintiff's recovery, is the same which produced the several statutes relative to the sets off, which, it is generally allowed, have extended the doctrine as far as the claims of justice

require. Yet whatever reasoning and analogy they furnish, is totally adverse to the grounds of defense set up in the present case.

The law will not, upon slight motives, suffer the course of administration to be impeded which must happen, if the personal concerns of an administrator are taken into view, where he is collecting the property of his intestate, for the use of creditors and distributees. To countenance such a doctrine, by a decision of this court, would lead to consequences of the most unjust and injurious kind, and overturn the settled and well digested system, which has been handed down to use. Upon the second question therefore our opinion is, that the husband is not barred by the warranty of his wife, under the circumstances of this case.

HALL, J., *contra.* Two questions have been made in this case. 1st. Is the plaintiff barred in this action, by the warranty of his wife while sole? 2d. Ought the plaintiff to have been permitted to prove, on the trial, that his wife was *non compos*, &c., at the time she made the deed of gift to the defendant?

On the trial the inclination of my mind was, and still is, on both the points, with the defendant; yet I am not clear of doubts as to the first point. *Whitehall* v. *Squire*, 2 Salk., 595. As to the second point, Powell on Contracts, 9, and the cases there cited.

NOTE.—See upon the first point, *Hendricks* v. *Mendenhall*, 2 Car. Law Repos., 569; *Yarborough* v. *Harris*, 3 Dev. Rep., 40. *Burnett* v. *Roberts*, 4 Dev. Rep., 81.

JECHONIAS YANCY, Adm'r, &c. v. THOMAS MUTTER'S EX'S.—Page 513.

A debt contracted and partly paid before the mode of applying payments and calculating interest was changed, is subject to the present rule of calculation.

In Equity. The intestate, James Yancy, on the 14th day of November, 1780, executed to Thomas Mutter, the defendant's testator, a bond in the penalty of eighty-six thousand and thirty-six pounds of crop tobacco, to be inspected at Petersburg or Blandford, in Virginia: conditioned for the payment of 46,315 pounds of like tobacco—10,753 pounds, part thereof, on the 25th day of December, 1783, with legal interest thereon from the 18th day of May, 1779—and a like quantity annually, until the whole should be paid: with an agreement endorsed on the bond, that the obligee would receive payment in tobacco, gold or silver, at any time, and thereby stop the interest.

Sundry payments were made by the intestate to the testator, to a large amount. Mutter, the testator, made a statement of the balance due him on the bond, thereby claiming only £169, Virginian money, in 1798, and offered to take the complainant's bond for that sum, and to deliver him the original bond. In this statement, Mutter had applied the payments to the discharge of the principal, and left the interest unsatisfied, according to the method of applying payments and calculating interest, then observed in the courts of justice. The complainant refused to give his bond for the balance, or in any other manner to ascertain conclusively the amount then due to Mutter. Mutter died. His executors brought an action at law on the bond; and on the trial applied the payments in discharge of the interest in the first place, and calculated the interest according to the present rule, "of applying payments in discharfie of the interest first, and calculating the interest on the balances in such manner

as not to calculate interest on interest," and thereby recovered judgment for a much larger sum than £169, Virginia money. The bill prayed, and the complainant had obtained, an injunction for the difference.

This cause was several times argued by Duncan Cameron for the complainant, and Leonard Henderson for the defendants.

HALL, Judge. The principle upon which interest is calculated at this day, is different from that which was in use at the time the bond in question was executed. This seems to be evidenced by the opinions entertained by the parties themselves, at the time they attempted to bring about a settlement. It is to be observed, that the decisions in our courts, which have fixed the rule by which interest is now calculated, took place on bonds executed when a different rule prevailed. It was not a good objection, in those cases, that the parties, at the time of making the contract, were presumed to have in view a different rule from that which was about to be established. This case must be decided on the same principle. If, indeed, the parties themselves had made a settlement, and an adjustment of their accounts, they would have been bound by it, and the principle adopted by them would be the one which would now govern the Court; but this they have not done. They attempted to make a settlement, but did not effect it. They then stood as if that attempt had not been made.

The covenant binds the covenanter to the delivery of tobacco only, and that at stated times. The indorsement, by enlarging the limits of the covenant, puts it in the power of the covenanter to pay the tobacco, or gold or silver in lieu thereof, whenever he might think proper. I cannot discover how the indorsement affects the present question. It has been properly tried at law, and I think on the proper principle. My opinion, therefore, is, that the Injunction shall be dissolved.

By the Court. It is the opinion of the Court, that the Injunction be dissolved with costs.

NOTE.—See *Bunn* v. *Moore*, 1 Hay. Rep., 279, and the cases referred to in the note.

HOLBROOK and wife v. JOHN MARTIN.—Page 515.

After a writ was issued, but before it was returned, the plaintiff, without any order for that purpose, took out a commission to take testimony, and a deposition was taken under it; *held* that it was irregularly taken and could not be read.

The plaintiff, after the writ issued, and before it was returned, took out a commission to take testimony. This commission was issued by the clerk, at the request of the plaintiff, without any order of court, or of a judge. After the writ had been served on the defendant, plaintiff gave him due notice, and went on to examine a witness; the deposition was properly taken according to the notice, certified and returned. Afterwards, issue was joined, and the cause came on for trial, when this deposition was offered in evidence. It was also offered to be proved, that the witness, at the time of taking his deposition, was aged, infirm and like to die; and although living at the time of the trial, was unable to attend the court through infirmity; and that one of the witnesses mentioned in the notice, had actually died by old age, before the day appointed for taking the depositions.

It also appeared of record, that the following order was made by the court of Salisbury District, long before the issuing the writ in this case, to-wit: "that commissions to take testimony issue when required by either party, in all suits in this court, and that reasonable notice be given, &c."

The Court rejected the parole evidence as inadmissible, and the deposition was refused to be read. In consequence of which the plaintiff suffered a non suit.

The plaintiff moved to set aside the non suit, on the ground that the deposition was improper; rejected, and thereupon the case was ordered to this court.

By the Court. The deposition was irregularly taken, and therefore properly rejected. Let the rule be discharged.

NOTE.—The acts of 1777 and 1783 (1 Rev. Stat., ch. 31, sec. 70) prescribes the manner in which depositions shall be taken before the cause is put to issue, which see.

JACOB WAGGONER v. JOHN GROVE.—Page 516.

Where a suit was brought against a party who lived in another district, and a judgment by default taken, which was afterwards set aside on condition of the defendant's pleading to the merits of the cause only, and upon the trial the plaintiff recovered less than fifty pounds, *it was held* that a nonsuit must be entered.

The writ in this suit was returned to Salisbury Superior Court, September Term, 1802, and judgment by default entered against the defendant. At March Term, 1803, he moved to set aside the default, and for leave to plead; which was granted on condition that he plead to the merits of the cause only, and thereupon he plead the general issue and payment. At March Term, 1804, the cause came on for trial, and the amount of the plaintiff's demand being ascertained, appeared to be under fifty pounds. The parties living in different districts. The defendant's counsel moved that a nonsuit be entered, which was done. The plaintiff's counsel then moved to set aside the nonsuit, on the ground that the defendant was estopped to take that advantage, by the condition annexed to the order setting aside the judgment by default; and, on motion, the case was ordered to this court.

By the Court. The interlocutory judgment setting aside the default, can have no influence on this question; neither the one, or the the other, can give the District Court jurisdiction, in a case where it otherwise had none. Let the rule for setting aside the nonsuit be discharged.

NOTE.—See *Hart* v. *Mallet*, 2 Hay. Rep., 136; *Dickens* v. *Ashe*, Ibid., 176.

BENJAMIN NORFLEET v. WILLIAM HARRIS.—Page 517.

Husband and wife must join in detinue for the slaves of the wife detained before and at the time of the marriage.

Detinue for negroes. Pleas, non detinet and statute of limitations. On the trial in Edenton Superior Court, April Term, 1803, the jury found a special verdict, to-wit: "That the defendant does not detain any of the negro slaves mentioned in the plaintiff's declaration, except John, George and Oxford, &c. That the defendant being possessed of these three negroes, made a gift of them to his daughter, the wife of the plaintiff, before her marriage, and whilst she was a child; that she afterwards married Samuel H. Jameson—after his death, John Cunningham—and after whose death, she married the present plaintiff. That the said negroes, ever after the said gift, remained in possession of the defendant, who held and claimed them as his own property; and neither the plaintiff, or his wife, or either of her said former husbands, ever claimed the said negroes, until this suit was brought. Upon these facts, the jury being ignorant whether the plaintiff is entitled to maintain this action in his own name, submits the same to the judgment of the court; and if the court shall be of opinion that the law is for the plaintiff, then they find for him, &c., but if otherwise, they find for the defendant.

By the Court. This case is governed by the authority of the case, *Wm. Johnston and Wife* v. *Abner Pasteur.*

Let judgment of nonsuit be entered.

NOTE.—See *Johnston* v. *Pasteur*, ante, 464, and the cases cited in the note.

SAMUEL JOHNSTON v. GILES WILLIAMS.—Page 518.

The plea of the statute of limitations may be pleaded after issue joined, if were omitted by the inadvertence of counsel, and appears to be a conscientious defense.

The plaintiff brought an action of detinue for slaves, returnable to Fayetteville Superior Court, April Term, 1803. At that term, the defendant employed John Williams, Esq., to defend the suit, and informed him, that he had purchased some of the slaves for a fair and valuable consideration, in the year 1791, and had been in possession of them, and their increase, continually after that time, and instructed his attorney to plead such pleas as were best adapted to his defense. The attorney, at that time, conceived that the act of limitation would be a proper plea, and intended, and would have plead the same, with the general issue, had he not accidentally omitted to plead at all. At October term, 1803, the defendant's attorney moved for leave to plead the act of limitations; which being opposed, the case was ordered up to this court.

Hall, J. It is not the fault of the defendant that the plea of the statute of limitations is not pleaded; he direeted his counsel to do so, he omitted to do it, but that omission was not intentional. From the representation made of the defendant's situation, with respect to the property in question, he might rely upon that plea with a pure conscience, as it intended to protect property which he has been long in possession of, and which he honestly acquired, for a fair and valuable consideration. I think he should have liberty to enter the plea; but on payment of costs from the time it should have been entered, until the motion made. The plaintiff's title will be in the same situation it was in at the time the suit was brought.

By the Court. Leave shall be granted the defendant to enter the plea of s at. lim. on payment of costs from the

time the plea ought to have been entered, until the time the motion was made to add the plea.

NOTE.—See *Reid* v. *Hester*, ante, 488; *Hamilton* v. *Shepherd*, 2 Car. Law Repos, 471.

RICHARD SINGLETON v. THOMAS KENNEDY—Page 520.

When the verdict is for more than the damages laid in the writ, the variance is fatal on a writ of error, unless the plaintiff will enter a remittitur for the surplus: And leave will be given him to do so upon paying the costs of the writ of error.

Writ of error to Morgan Superior Court, to reverse a judgment obtained in an action of covenant, by the present defendant against the plaintiff in error, in Burke County Court. The only error of consequence assigned, was, "That there is a material variance between the verdict of the jury and the writ; the verdict and judgment being for £102 5 0, besides the costs of suit, and the damages in the writ being laid at £50, only."

HALL, J. I think the error assigned in the proceeding below, is such, that the judgment thereupon given must be reversed; unless the defendant in error think proper to enter a remission of the excess above the sum laid in the writ, and also to pay the costs of the writ of error. 1 H. Bl. Rep., 643.

By the Court. Leave is given the plaintiff below to amend, by remitting all the damages in the verdict, except the sum mentioned in the writ, on paying costs of the wuit of error —otherwise the judgment to be reversed in toto, with cests.

CHRISTIAN L. BENZIEN, et al. v. JOHN LOVELASS, et al.—Page 520.

Where the complainants attempted to amend by making new defendants, but drew their amended bill in such a manner, that it did not appear to have any relation to the original bill, they were permitted to amend further so as to connect the two bills, upon their paying all the costs incurred on the copies of the amended bill issued.

In Equity. The complainants attempted to amend their bill, by making many new defendants; but drew their amended bill in such a manner, that it did not appear to have any relation to the original bill. Copies of the amended bill had been sent out and served on the defendants. The complainants counsel having discovered the omission, moved the Court for leave to amend their proceedings, by connecting the two bills together, so as to make up but one record; and the only contest was, upon what terms the leave should be granted.

HALL, JUDGE. I think it but reasonable to grant the leave prayed; but surely it must be granted upon payment of the costs incurred by the copies of the amended bill which issued, and were served on persons whom they now chuse to consider as strangers to the bill at that time. This was their own act; and although they may eventually succeed in the cause, yet it would be very unreasonable to make the defendants pay the costs of those copies. I am clearly of opinion they must pay all costs which have arisen in consequence of the omission they now wish to amend, by making the same persons defendants.

By the Court. The complainants must pay the costs of the copies which issued improperly against the persons now prayed to be parties—but no attorney's fee.

CYRUS SHARP v. JAMES MURPHEY.—Page 521.

A horse racing contract must be in writing: and parol evidence shall not be admitted to vary it.

The parties, by an agreement under their hands and seals, covenanted to run a race on the 5th day of March, 1802, between the hours of twelve and three o'clock in the afternoon. Having met at the time, they, by parole, agreed to postpone the running to a later hour; but, in all other respects, to be governed by the articles of the race. The plaintiff brought an action of assumpsit, and, on the trial, had a verdict, subject to the opinion of the court.

By the Court. Judgment that the verdict be set aside, and a non-suit entered, on the authority of the Act of Assembly.

NOTE.—See *Critcher* v. *Pannell*, 1 Murph. Rep., 22; *Moore* v. *Parker*, Ibid, 37; *Jackson* v. *Anderson*, Ibid, 137. The act of 1861 (Rev. Stat., ch. 51) makes void all bets, contracts, &c., respecting horse racing.

MOSELY v. MOSELY.—Page 522.

A deposition will be rejected, if the witness refuse to answer proper questions on a cross examination.

So also, if written by the attorney of the party who has taken the deposition.

In Equity. The complainant offered to read the deposition of Mrs. Livingston. To which it was objected, that she, on the examination, had behaved rudely to Mr. Watters, the guardian of the defendant, and had refused to answer some questions put to her by him relative, as the commissioner believed, to the subject matter of the suit. The complainant also offered the deposition of Mrs. Tucker,

and to that the defendant objected, that it was reduced to writing by Mr. Walker, a practising attorney then attending the examination on behalf of the complainant, but admitted that this was done under the view and control of the commissioner, in the presence of the defendant, and without any objection taken at the time.

HALL, J. The best mode of receiving testimony, is certainly from the mouths of the witnesses themselves; and if any other mode is substituted in the room of that, it ought to be guarded with much precaution. It may sometimes be convenient, but it is not of necessity, that depositions should be written by counsel concerned in the cause. The best may sometimes feel a bias that inclines them too much to one side, without being sensible of it; but if the case was otherwise, those more relaxed in principle ought not to be trusted. This remark applies to mankind generally. Testimony is presumed to flow from disinterested sources; and the medium through which courts of justice receive it, ought to be as unexceptionable as the nature of the case will admit of. This idea corresponds with the regulations prescribed by Congress, for taking testimony to be read in the Federal Courts; and although those regulations, *as such*, have no binding force in our courts, yet the reason on which they are founded should be duly appreciated.

By the Court. These depositions were properly rejected by the District Court, and ought to be suppressed.

STATE v. JOHN M'LELLAND.—Page 523.

If a defendant be acquitted in the County Court and the State Appeal, a bond need not be given; and it is sufficient if the appeal be filed in the Superior Court at any time before State's day.

Indictment for assault and battery. The defendant was

indicted in the County Court of Rowan, and acquitted, and judgment in favour of the defendant; from which the attorney for the State appealed to the Superior Court of Salisbury District. The cause came on for trial at September term, 1803, when the counsel for the defendant moved to have the same dismissed for two causes. 1st, that no bond had been given by the State, or prosecutor, to prosecute said appeal with effect, or, in case of failure, to pay such costs as might be awarded, according to an act of the General Assembly respecting appeals; 2dly, that the appeal had not been brought up by the party praying it, within the time prescribed by the aforesaid act of Assembly.

The Court suspended judgment upon this motion, and directed a jury to be impanelled to try the issue. Upon the trial, it appeared that the prosecutor had given the defendant great provocation and offence, and that the assault and battery which the defendant committed, was very trifling, but not justified in law. The defendant was convicted.

The Court reserved the consideration of the foregoing motion, and referred the same to this Court; and if the Court should be of opinion, that the said appeal ought not to be dismissed, then that they give judgment against the defendant, upon the conviction aforesaid, and the affidavits accompanying the case.

By the Court. A bond, in case of an appeal on the part of the State, is not necessary. Recognizance is sufficient; and it is sufficient that such appeal and recognizance be filed in court at any time before State's day. Judgment that defendant be fined two pounds and costs.

NOTE—The State is not entitled to an appeal from the County to the Superior Court, upon the acquittal of a defendant in a criminal prosecution. *State* v. *Jones*, 1 Murph. Rep., 257.

DECEMBER TERM, 1804.

SAMUEL HOLDING, Ex'r., &c., et al. v. FREDERIC HOLDING.—Page 525.

NOTE.—See S. C. Reported in 1 Murph. Rep., 9.

ALEXANDER WORKE v. THOMAS HUNTER.—Page 527.

Where a defendant was acquitted on an indictment, and the clerk, without any express judgment being given by the court, issued an execution against him for his witness fees, under which the sheriff sold his land, and the defendant in the execution afterwards sold to another, *it was held* in a suit by the purchaser at the sheriff's sale against the purchaser from the defendant, that the sheriff's sale bound the land, but the plaintiff must prove title in him against whom the execution issued.

Ejectment. On the trial the case appeared to be this. A bill of indictment had been found against one George Harkness for perjury; he appeared, plead not guilty, and was acquitted, at.....Term of Salisbury Superior Court. No express judgment was given by the Court, as to the costs of the prosecution. The clerk, however, under the general understanding and construction of the act passed in the year 1779, ch. 4, sec. 19, then entertained, issued an execution against the goods and chattels, lands and tenements of the defendant Harkness, for the amount of the allowances to the witnesses on the part of the State for their attendance. The sheriff levied an execution on the land in question, Harkness being then in possession of it, and claiming it as his property, and sold the same to Worke, the plaintiff. Harkness afterwards sold the land to Hunter, the defendant, who had full notice of the sale by the sheriff, and purchase by Worke. The execution was not returned, the sheriff having died before the return

day; nor was there any entry or memorandum of the issuing of the execution of record. The only evidence of that fact was the testimony of the clerk. The only evidence of the levying of the execution was, acknowledgments of Harkness, and of Hunter the defendant. The only evidence offered by the plaintiff, of title in Harkness at the time the execution issued, was his acknowledgment, possession and claim. On this ground, the defendant's counsel moved for a non-suit.

Two questions were submitted to this court:

1. Whether a sale, under these circumstances, can bind the land in dispute?

2. Whether the court did right, in submitting the case to the jury, or ought to have non-suited the plaintiff.

By the Court. The sheriff's sale, under the circumstances of this case, did bind the land; but they also deem it regular, that the plaintiff in ejectment, who claims under a sheriff's sale, shall establish a title in him against whom the execution issued. A new trial was therefore awarded.

NOTE.—See *King* v. *Featherston*, 4 Dev. & Bat. Rep., 126; *Gorham* v. *Brenon*, 2 Dev. Rep., 174; *Phelps* v. *Blount*, Ibid, 177; *Sikes* v. *Basnight*, 2 Dev. & Bat. Rep., 157, and Qu?

WILCOX ADM'R. v. WILKINSON'S EX'R.—Page 528.

NOTE.—See S. C. reported in 1 Murph. Rep., 11.

JOHN C. STANLEY v. THOMAS TURNER.—Page 533.

NOTE.—See S. C. reported in 1 Murph. Rep., 14.

JAMES CRITCHER v. WILLIAM PANNELL.—Page 545.

NOTE.—See S. C. reported in 1 Murph. Rep., 22.

JAMES MOORE v. RICHARD SIMPSON.—Page 548.

NOTE.—See S. C. reported in 1 Murph. Rep., 33.

THOMAS ORMOND v. KINCHEN FAIRCLOTH.—Page 550.

NOTE.—See S. C. reported in 1 Murph. Rep., 35.

JACOB BLOUNT'S ADM'R v. CHARLES JOHNSTON'S EXR'S.—Page 551.

NOTE.—See S. C. reported in 1 Murph. Rep., 36.

JOHN MOORE v. DANIEL PARKER.—Page 553.

NOTE.—See S. C. reported in 1 Murph. Rep., 37.

ELIZABETH WYNNE v. MISHAW ALWAYS.—554.

NOTE.—See S. C. reported in 1 Murph. Rep., 38.

CHURCHILL & LAMOTHE v. ABRAHAM COMRON'S ADM'R.—Page 555.

NOTE.—See S. C. reported in 1 Murph. Rep., 39.

ELISHA STOCKSTILL v. JOHN SHUFORD, et al.—Page 556.

NOTE.—See S. C. reported in 1 Murph. Rep., 39.

COMMISSIONERS OF FAYETTEVILLE v. WILLIAM JAMES.—Page 556.

NOTE.—See S. C. reported in 1 Murph. Rep., 40.

INDEX

ABATEMENT:

1. An action of debt, founded on a penal statute, as in this case, for harboring runaway slaves, abates by the death of the plaintiff, and cannot be revived. *Estis* v. *Lenox*, 204.
2. An action for seducing away a slave does not abate by the death of the defendant. *McAlister* v. *Spiller*, 226.

ACTION:

See Deceit—Justice of the Peace—Mills—Sheriff, 2.

ACTS OF ASSEMBLY:

Acts of Assembly take effect from the beginning of the session in which they are passed. *Sumner* v. *Barksdale*, 241.

ADVANCEMENT:

Advancement of personal property made by an intestate in his life-time to his children, are under the act of 1784, (1 Rev. Stat., ch. 64, sec. 1) to be brought into distribution for the benefit of the widow. *Davis* v. *Duke*, 439.

AMENDMENT AND JEOFAIL:

Where the complainants attempted to amend by making new defendants, but drew their amended bill in such a manner, that it did not appear to have any relation to the original bill, they were permitted to amend further so as to connect the two bills, upon their paying all the costs incurred on the copies of the amended bill issued. *Benzien* v. *Lovelass*, 567.

See Attachment 2, 6—Penal Actions, 2.

ANSWER:

1. An answer taken abroad under a commission, may be read, though the commission was taken out in blank and filled up by the defendant with the names of two persons, who did not appear either by the commission or certificate, to be authorized to anminister oaths where the answer was taken. *Hunt* v. *Williams*, 143.

2. If a commission to take an answer be filled up by the master, the party cannot strike out the name of the commissioner to insert another, though he might have done so, had the commission been taken out in blank. *Dawson* v. *Speight*, 144.

See Evidence, 11.

APPEAL:

1. The sureties in an appeal bond cannot be charged, if the condition of the bond leave out the most effective part required by law, to-wit, that the sureties should be discharged on the performance by the appellant of the judgment in the court above. *Waller* v. *Pitman*, 237.

2. Where, upon the hearing of a cause by petition for an account in the County Court, the court ordered an account to be taken by an auditor, upon the coming in of which exceptions were filed by the plaintiff, which being argued and overruled, the plaintiff appealed, *it was held* that the Superior Court would begin with the exceptions and not to hear the cause first upon the petition, answers and proofs, though possibly it should not stop with the hearing on the exceptions. *Erwin* v. *Arthur*, 542.

3. If a defendant be acquitted in the County Court and the State appeal, a bond need not be given; and it is sufficient if the appeal be filed in the Superior Court at any time before State's day. *State* v. *McLelland*, 569.

See Certiorari.

ARBITRATION AND AWARD:

1. Awards are to be construed liberally; and in mercantile transactions, not admitting of certainty, nice objections ought not to defeat an award. If that to which the objection of uncertainty is made, can be ascertained by the context, the objection shall not prevail. *Borretts* v. *Patterson*, 27.

2. The meaning of the rule that an award must be mutual, is that the thing awarded to be done shall be a final discharge of all future claims by the party in whose favor the award is made against the other for the cause submitted. *Ibid.*

3. An award which merely directs a sum of money to be paid, but without stating the matter of controversy, or directing a release, or saying that the payment shall be in satisfaction of any specified injury or demand, may be rendered sufficiently certain, final and mutual by averments connecting the award with the submission. *Bryant* v. *Milner*, 398.

ASSAULT:

See Damages.

ASSUMPSIT:

1. The action of assumpsit will lie on either an express or implied promise to pay for the use and occupation of land. *Hayes* v. *Acre*, 159.

2. Assumpsit will not lie where a party has a remedy on a covenant under seal; therefore where in a charter party under seal the defendant expressly covenanted to man and victual the vessel for the specific voyage and back again, &c., and afterwards sold her in a foreign port and received the money, *it was held*, that as the whole tenor of the contract shewed that it was the intent of the parties that the vessel should return, it was a breach of the charter party for the defendant to sell, for which the plaintiff could bring covenant or debt, which was a higher remedy than assumpsit. *Davis* v. *Gibson*, 233.

See Attorney & Client.

ATTACHMENT:

1. The attachment law does not require the plaintiff to swear positively to the amount of his debt; therefore it was held good where the plaintiff swore that he had good reason to believe that the defendant and his connexions "had endamaged him to the amount of" a certain sum. *Powell* v. *Hampton*, 218.

2. Where an attachment was executed and returned to a court on the same day on which it was issued, the return is irregular, but is helped by the statute of jeofails, after verdict or judgment by default. *Ibid.*

3. It is not error for the court to order goods attached to remain in the hands of the sheriff of the county, such sheriff being the plaintiff in the suit. *Ibid.*

4. If a plaintiff in attachment fail to give bond or file an affidavit, it should be pleaded in abatement; it cannot be taken advantage of by writ of error. *Ibid.*

5. It is not error that the sheriff who summoned the jury to execute a writ of enquiry in an attachment was the party plaintiff in the cause. *Ibid.*

6. If an officer executing an attachment returns "executed and returned" without specifying on what he has levied, the return is informal, but is cured by the statutes of jeofail, after verdict or judgment by default. *Ibid.*

7. It cannot be taken advantage of by writ of error that no declaration or other paper setting forth the nature of the charge was filed in a suit by attachment. *Ibid.*

8. A garnishee may have a writ of error on the judgment against himself, or the defendant in the attachment. *Haughton* v. *Allen*, 277.

9. The attachment law does not require the plaintiff to swear positively to the amount of his debt; therefore it was held good when the plaintiff swore that he had good reason to believe that the defendant had, in company with others, endamaged him to the amount of £219. *Bickerstaff* v. *Dellinger*, 388.

10. If the plaintiff in attachment fail to give bond or file an affidavit, it should be pleaded in abatement; it cannot be taken advantage of by writ of error. *Ib.*

ATTORNEY AND CLIENT:

If an attorney promises his client, during the suit, to indemnify him against the consequences of it, the promise is without consideration and will not support an action. *Mitchell* v. *Bell*, 157.

BASTARDY:

The recognizance, on a charge of bastardy, to appear at the County Court, must be taken before two justices. *State* v. *Quinnery*, 25.

BAIL:

1. If the writ be altered from debt to case, the bail are no longer bound. *Bryan* v. *Bradley*, 54.

2. A man indicted for murder cannot be bailed upon affidavits taken *ex parte* by persons not authorized to take them. *State* v. *Dew*, 88.

3. Where costs, which accrued after judgment, were not set forth in the *sci. fa.* against the bail, *it was held* to be no variance, on the plea of *nul tiel record*. *Alston* v. *Bullock*, 209.

4. The county to which the *ca. sa.* against the principal should issue, in order to charge the bail, is the county in which the defendant was arrested, unless the return of the sheriff or something equally satisfactory and conclusive evinces that the county, where the defendant was taken, no longer continues to be his proper county. *Benton* v. *Duffy*, 229.

BILLS OF EXCHANGE AND PROMISSORY NOTES:

1. In the case of paper not negotiable, the law is not so strict as in the case of negotiable paper, but the assignee must apply for payments in a reasonable time, and also give notice of non-payment in a reasonable time, and on failure of giving such notice, if a loss really happens, the assignee must sustain it. *Plummer* v. *Christmas*, 46.

2. Damages cannot be claimed under the act of 1796, (see 1 Rev. Stat., ch. 13, sec. 8,) on a bill which has not the words "for value received." *Anonymous*, 70.

3. The assignor of a bond is not released by the obligor being discharged on a *ca. sa.* under the insolvent debtor's law. *Green* v. *Blackledge*, 73.

4. The act of 1786, (1 Rev. Stat., ch. 13, sec. 3,) making bonds assignable, did not operate upon bonds theretofore made. *Wilkerson* v. *Wright*, 422.

5. Where A. had money in the hands of B. who could not pay it, but offered a bill on New York, which A. did not want, but finding that C. was willing to take it, received the money from him, and C. in consequence of an order from A. received from B. his bill of exchange: upon the protest of this bill, and B.'s failure, *held* that A. was not accountable to C. for the money paid for the bill, as he was neither endorser nor had promised to become responsible. *Wilkins* v. *McKinsie*, 507.

6. Damages and interest on bills, are to be assessed according to the law of the place where the bill was drawn, and not where it was endorsed. *Schermerhorn* v. *Pelham*, 510.

See Partnership, 1.

BOND:

See Evidence, 8; Presumption of Payment.

BOUNDARY:

1. If a natural boundary be called for in a grant, a line is to be extended to it, disregarding distance. *Witherspoon* v. *Blanks*, 65.
2. If upon the face of a deed it be uncertain whether the boundary line be at one place or another, parol evidence may be received to shew the true place: thus the line called for was "North to Bryant's;" north would not lead to Bryant's corner, though it would strike his line, and there was an old marked line to the corner permitted to be proved by parol. *Bustin* v. *Christie*, 68.
3. If there be a variance between the natural boundaries and the courses and distances called for in a deed or grant, the former shall be preferred. *Harramond* v. *McGlaughon*, 84.
4. A line of a deed or grant calling for the line of another grant, shall be extended to it if it be in the course, though beyond the distance. *Miller* v. *White*, 135.
5. Where the lines called for in a grant were "East 177 poles to an oak, thence Southwardly, the various courses of the river;" and there was a marked oak at the end of the distance; and the river from the point where a direct line from the oak would intersect it, ran southwardly; but if the east line went directly to the river, the river from the point of intersection would run westwardly until opposite the oak; *it was held*, that the jury ought to find the line to the oak, and thence southwardly to the river, if they believed that to be the real line run when the original survey was made. *Pender* v. *Coor*, 140.

CAPIAS AD SATISFACIENDUM:

If a defendant be arrested on a *ca. sa.* and discharged by the plaintiff's consent, the plaintiff cannot have a new execution against him; but if he is arrested, and escape by the neglect or permission of the sheriff, the plaintiff may have a new execution, though the sheriff could not arrest or hold him in custody on the old writ. *Ballard* v. *Averitt*, 48.

See Bills of Exchange and Promissory Notes, 3.

CERTIORARI:

1. A *certiorari* is not grantable to remove a cause from the county court before trial, especially where the party has

the right of appeal, and the county court has original exclusive jurisdiction. *Street* v. *Clark*, 11.

2. Proceedings before a single justice cannot be brought before the county court by *certiorari* or other writ. They can come before it only by appeal. *Alexander* v. *Bateman*, 160.

CONFISCATION:

1. All lands, the legal title to which remained in Henry Eustace McCulloch on the 4th of July, 1776, were confiscated, and the legal title thereof vested in the State. *Den on Dem. of Cunningham* v. *Michael*, 210.
2. The proviso to the 6th section of the confiscation law of 1779, ch. 5, did not vest any title in the wife and children of absentees. *Faris* v. *Simpson*, 294.
3. Under the confiscation law of 1776, titles were not divested out of the persons coming within its operations without proceedings in the nature of an office found—But by the second confiscation act of 1779, the estates of the persons named therein were divested by the force of the act itself. *Ib.*
4. Lands held by one, who ceased to be a citizen by the Revolution, in trust for the Unitas Fratrum, were not confiscated by the confiscation acts. *Marshall* v. *Lovelass*, 325.
5. Where confiscated lands were sold by the State and the contract afterwards relinquished and the lands surrendered to the State before the year 1794, the lands passed to the University of that year. (See 2 Rev. Stat., page 428.) *Hughes* v. *University*, 446.
6. A person, who had been one of the objects of the confiscation acts, was held he entitled, under the treaty 1783, as a British subject to recover the balance due on contracts made before the acts of confiscation. *Ray* v. *McCulloch*, 543.
7. Where a deed in trust of land was made to a firm, consisting of several partners, some of whom afterwards became subject to the confiscation laws, but one of them did not; *It was held*, That this one was adequate and competent to hold the land and execute the trust. *University* v. *Rice*, 547.

CONSTITUTION:

Where under the act of 1795 (New. Rev., ch. 433) a treasurer of public buildings was elected by the county court, and

afterwards another person was elected to the same office under the act of 1797 (New Rev., ch. 488) and brought suit against the first for money remaining in his hands, *it was held* that the court would not decide incidentally on the constitutionality of the latter act, but that in that case its authority was sufficient to sustain the action. *Freeman* v. *Lester*, 206.

CONTRACT:

See Equity, 3—Horse Racing.

COSTS:

1. If the prosecutor on an indictment had probable cause, though his motives were of the worst kind, he ought not to pay costs. *State* v. *Forsyth*, 16.
2. If the county court order the prosecutor to pay costs, and at the next term revoke this order, and order the defendant to pay them, although such a proceeding is improper, on an appeal from the last order, the Superior Court will not go into an examination of the fact, if the whole record of the cause has not been brought up. *Ibid.*
3. A defendant in an indictment is not bound to pay the witnesses for the State, except upon conviction. *State* v. *Hargate*, 196.
4. If the same jury attend on the premises in ten different *caveats* for diferent claims to different parcels of land, the caveators in all the cases being the same, but the defendants different, the jurors shall receive pay in each case. *Harris* v. *Lenoir*, 216.

COVENANT:

1. Covenant will not lie on the assignment under seal of a bond for the payment or delivery of tobacco, the breach assigned being that the obligor did not deliver the tobacco. *Brickell* v. *Batchelor*, 239.
2. An assignee by estoppel merely, where no interest passed by the assignment, cannot maintain an action of covenant. *Nesbit* v. *Nesbit*, 403.

See Assumpsit, 2.

DAMAGES:

In an action for an assault, any immediate provocation may be given in evidence to mitigate damages, but not any remote provocation. *Barry* v. *Inglis*, 72.

See Bills of Exchange & Promissory Notes, 2-6.

DECEIT:

An action lies against one not a party to the contract for deceitfully asserting that an unsound mare is sound, and fraudulently encouraging the plaintiff to buy her. *Irwin* v. *Sherril*, 1.

DEMAND:

On a promise to deliver goods, a demand before action brought is indispensably necessary. *Benners* v. *Howard*, 93.

DEPOSITION:

1. Where the notice is to take depositions between certain hours of the day, such depositions shall not be read, unless it appears that they were taken within the time specified. *Farrar* v. *Hamilton*, 7.
2. Where the notice was "at the house of Capt. A. *Gordoner*, on the 13th and 14th *days* of March next, to take the deposition of said A. *Gardner*, on the commission was to cause A. *Gordan* to come before you"—between *Ridge's Orphans, by their next friend J. Haines, complainants*, and *W. T. Lewis and other defendants;* and the preamble of the deposition recited, "to take the deposition of A. *Gordon*—wherein *J. Haines, as the next friend of the orphans of W. Ridge is plaintiff, and W. T. Lewis and W. Corch and others*, are the defendants, at the house of the said A. *Gordon*," it was held that the deposition might be read. *Ridge* v. *Lewis*, 536.
3. If the notice be at the court house in Jefferson, in the county of Jefferson; and the commission is directed to "G. D.; P. T.; and H. B. Esquires; and the deposition appears to be sworn to "before us, two of the acting justices of the peace, for Jefferson county, at the court house for said county, it may be read. *Ib.*
4. A deposition taken under a commission directed to A. and B. Esquires, who certify it under their names with "J. P." annexed, may be read. *Ib.*
5. Where a notice is to take a deposition at the "dwelling house" of a witness, and the certificate states that the deposition of the witness was taken at "his own house," it is sufficient. *Ib.*
6. After a writ was issued, but before it was returned, the plaintiff, without any order for that purpose, took out a

commission to take testimony, and a deposition was taken under it, *held*, that it was irregularly taken and could not be read. *Holbrook* v. *Martin*, 562.

7. A deposition will be rejected, if a witness refuse to answer proper questions on a cross examination. *Mosely* v. *Mosely*, 568.

8. So also, if written by the attorney of the party who has taken the deposition. *Ib.*

DEPRECIATED CURRENCY:

Contracts in depreciated currency should be scaled according to the rate existing at the time the contract was made. *Bruton* v. *Bullock*, 448.

DETINUE:

1. A special property as trustee, derived from the order of a court in Virginia, accompanied by possession under the order, is sufficient to maintain detinue for slaves. *Wade* v. *Edwards*, 482.

2. Detinue lies in every case where the property is detained, and no regard is had to the manner in which the defendant acquired possession. *Johnston* v. *Pasteur*, 520.

See Husband and Wife, 6, 9; Pleading and Practice, 15.

DEVISE:

1. Land purchased after the making of a will, does not pass by any devise in it. *Johnston* v. *Hunly*, 132.

2. A devise by a testator to his two sons, A. and B. in fee, and that if either of them should die without lawful issue begotten of their bodies, his son C. should have the lands of the one so first dying, is too remote, and the limitation to C. is therefore void. *Den on Dem. of Sutton* v. *Wood*, 312.

3. Where a testator after several bequests of specific chattels to his wife, proceeded thus: "also all the remainder of my estate whether within doors or out, that was not before given away—all the residue of my estate, and every part thereof, I give to my wife S. W., she paying all my just debts and funeral charges, &c., to her and her heirs forever;" *it was held*, that his real estate passed to his wife in fee. *Ib.*

4. When a devise would give to heirs what they would take without it, they shall be in by descent. But where the

devise makes an alteration in the limitation of the estate, the heirs take by purchase. *Campbell* v. *Herron*, 381.

5. A devise to the widow for life with remainder to the testator's three daughters, (his heirs-at-law,) their heirs, executors, administrators and assigns, makes the daughters joint tenants. *Ib.*

See Slaves, 4.

DISTRESS:

A landlord has no power in this State to distrain for rent, the process of distress never having been adopted here. *Dalgleish* v. *Grandy*, 161.

DISTRIBUTION:

See Advancement; Executors and Administrators, 3–6.

EJECTMENT:

1. The plaintiff cannot declare an ejectment for a whole tract of land, and give evidence of title to, and recover, an undivided moiety. *Young* v. *Drew*, 70.

2. A demise laid to have commenced on the 1st of February, 1801, and possession taken under it; "afterwards, to-wit, on the 1st of January, 1801, defendant entered," &c. This was held good, for the word "afterwards" shews that the entry of the defendant was after the demise to, and possession of, the plaintiff; and the words "1st of January, 1801," being repugnant may be rejected. *Brown* v. *Lutterloh*, 489.

3. Where the date of the demise and the commencement of the term were left blank in a declaration in ejectment, the declaration was held ill and the judgment arrested. *Hogg* v. *Shaw*, 514.

4. Where a defendant was acquitted on an indictment, and the clerk, without any express judgment being given by the court, issued an execution against him for his witness fees, under which the sheriff sold his land, and the defendant in the execution afterwards sold to another, *it was held*, in a suit by the purchaser at the sheriff's sale against the purchaser from the defendant, that the sheriff's sale bound the land, but the plaintiff must prove title in him against whom the execution issued. *Worke* v. *Hunter*, 571.

ENTRY:

See Grants, 2, 3; Right of Entry.

EQUITY:

1. The Court of Equity will issue a writ to the sheriff to take out of the defendant's possession, property, which is the subject of a suit, if it appear that there is danger of the removal of the property, unless he gives security for its production, &c. *Spendlove* v. *Spendlove*, 174.

2. Where a tenant covenanted to build and leave in repair, and did build, but the houses were destroyed by fire, a Court of Equity will compel him either to rebuild or to pay the value of the buildings, and the bill may be against either an assignor or assignee of the lease, when the lessor has not consented to the assignment. *Pasteur* v. *Jones*, 306.

3. When a person agreeing to sell lands, had a good title, and was able to convey at the time of the bargain entered into, and no delay can be imputed to him in performing his part of the contract, the contract is considered in equity as *then* executed, the subsequent conveyance being only matter of form, the substance being the bargain. *Ray* v. *McCulloch*, 543.

See Amendment; Answer, 1, 2; Parties, Pleading and Practice, 1, 7, 12, 16.

ESTOPPEL:

If a tenant in common recover a judgment against his co-tenant, and direct the execution to be levied on a particular part of the tenant, he is estopped to claim a partition against the purchaser. *Walker* v. *Bernard*, 214.

See Covenant, 2; Husband and Wife, 7.

EVIDENCE:

1. If a deed be executed by an attorney, his power, or a copy of it, must be produced. *Yarborough* v. *Beard*, 19.

2. A certified copy of an instrument required to be recorded is sufficient evidence for the party when the original is lost, and complete evidence for strangers. But as to instruments not required to be recorded, the register's certificate is of no validity. *Ib.*

3. A will which has been admitted to probate improperly in the County Court, cannot be attacked on that ground incidentally; therefore, in an ejectment, a copy of a will may be read as evidence, though one of the witnesses who proved the will was a legatee. *Stanly* v. *Kean*, 58.

4. Whether one who claims title under an execution is bound

to produce the judgment as well as execution. Qu? *Hargett* v. *Blackshear*, 62.

5. An order to pay money is, in the hands of the drawee, evidence of payment; otherwise of an order to deliver goods. *Blount* v. *Starkey*, 65.

6. If one entitled to two-thirds of three lots, sells two lots, the sale is evidence of a partition. *Slade* v. *Green*, 66.

7. Cohabitation as man and wife and having children is evidence of a marriage. *Felts* v. *Foster*, 72.

8. Under the plea of *non est factum*, it cannot be given in evidence that the bond was delivered as an escrow—such evidence is only admissible under a special plea. *Smallwood* v. *Clark*, 117.

9. The master of a vessel cannot give his protest in evidence. *Miller* v. *Ireland*, 134.

10. If a bill of lading be not stamped, parol evidence may be given of the contract to carry the goods. *Ib.*

11. On the trial of an issue in Equity, the defendant's answer cannot be read in evidence for him. *Salter* v. *Spier*, 142.

See Boundary, 2; Prison Bounds; Witness.

EXCEPTIONS:

See Appeal, 2.

EXECUTION:

See Capias ad Satisfaciendum; Ejectment, 4; Sheriff, 1, 3, 4, 5, 6.

EXECUTORS AND ADMINISTRATORS:

1. An administrator is not entitled to claim anything for loss of time and personal services, though he will be allowed his necessary expenditures. *Schaw* v. *Schaw*, 76.

2. A sale of land by two of four executors appointed by the will is good if the others refused the executorship. *Miller* v. *White*, 135.

3. Under the act of 1784 (see 1 Rev. Stat., ch. 64, sec. 1) a widow of an intestate dying without children is entitled to only one-third part of his personal estate. *McAuslan* v. *Green*, 172.

4. The Court of Equity allowed commissions at the rate of five per cent. only, though the County Court had allowed at the rate of ten per cent. on the whole amount of the estate. *Ib.*

5. Letters of administration granted in another State will not entitle the administrator to maintain a suit here. *Butts* v. *Price*, 201.

6. The personal estate of an intestate, no matter where it be, is distributable according to the laws of the country where the intestate was a resident, or, in other words, where he was a citizen or subject at the time of his death. Therefore, *it was held*, that slaves in Virginia which belonged to the estate of an intestate, who was a citizen and an inhabitant of this State, must be distributed according to the laws of this State. *Williamson* v. *Smart*, 268.

7. An executor cannot plead that he has fully administered since the last continuance; as every plea of fully administered must have reference to the commencement of the action, or at least to the time of process served. *Smoot* v. *Wright*, 449.

8. The act of 1715 (1 Rev., ch. 65, sec. 11) will bar a debt due on a bond though there be no person entitled to sue. *McLellan* v. *Hill*, 532.

See Limitations, Statute of, 5.

FORCIBLE ENTRY AND DETAINER:

An indictment for forcible entry and detainer upon the English statute of 21st of James 1st (See 1 Rev. Stat., ch. 49, sec. 6) must specify the kind of term, from which the party is expelled, to authorize a writ of restitution; and the term must be unexpired at the time of the trial. *State* v. *Butler*, 414.

FORGERY:

In an indictment for forgery the omission of a figure in the description of the instrument forged, is fatal. *State* v. *Street*, 98.

GENERAL RULES:

1. If a plaintiff die during the pendency of a suit, and his executors do not apply to carry it on within two terms after his death, computing from the day of his death, and not from the suggestion entered by the defendant, the cause will abate, and the defendant be discharged from further attendance, *Anonymous*, 82.

2. But if, after this, the executors apply to be made parties by a *sci. fa.*, or notice served on the defendant, and they do

not oppose it, and the plaintiffs are made parties by order of the court, it will be too late, afterwards, to move for an abatement; but the cause is to be tried. *Ib.*

GIFTS OF SLAVES:

1. The act of 1784 (1 Rev. Stat., ch. 37, sec. 19) requiring that deeds of gift shall be recorded, applies only where creditors and purchasers are interested. *Hancock* v. *Hovey*, 60.
2. Slaves sent to the husband by the wife's father soon after marriage are presumed to be given. *Killingsworth* v. *Zollicoffer*, 88.

GRANTS:

1. Grants of escheated or confiscated lands, by officers appointed to issue grants for vacant lands, are void, and must be so declared on the trial of an ejectment. *University* v. *Sawyer*, 67.
2. Lands lying in one county, cannot, under the entry laws of this State, be entered in another, and a grant issued on an entry made in another county is void. *Avery* v. *Strother*, 496.
3. Entries and grants of land within the Indian boundaries are void under the act of 1783. *Ib.*

HORSE RACING:

A horse racing contract must be in writing; and parol evidence shall not be admitted to vary it. *Sharp* v. *Murphey*, 568.

HUSBAND AND WIFE:

1. Whether slaves, to whom the wife has a right in remainder, vest in the husband if he die during the coverture, without having reduced them to possession. Qu? *Hynes* v. *Lewis's Ex'rs*, 33.
2. The private examination of a *feme covert* as to the execution of a deed, cannot be proved by parol. *Harrell* v. *Elliott*, 86.
3. Slaves, to whom the wife has a right in remainder, do not vest in the husband, if he die during the coverture, without having reduced them to possession. *Blount* v. *Haddock*, 207.
4. Slaves, to whom the wife has a right in remainder, do not vest in the husband, if he die during the coverture, without having reduced them into possession. *McCallop* v. *Blount*, 227.

5. Where a tenant for life bequeathed one-half of the emblements to which she was entitled to her daughter and left an executor, who, after reaping and housing the crop, married the daughter, but died before he had sold or otherwise disposed of it, *it was held*, that his possession of the crop was only as executor, and that upon his death, the wife and not his administrator was entitled to it. *Berry* v. *McAlister*, 239.

6. Husband and wife must join in detinue for her slave detained before and at the time of the marriage. *Johnston* v. *Pasteur*, 520.

7. A husband suing as administrator of another for slaves, is not estopped by the deed of his wife, made while sole, conveying the said slaves to the defendant. *Millison* v. *Nicholson*, 549.

8. A husband may shew the insanity of his wife before coverture to avoid a deed made by her whilst in that state of incapacity. *Ib.*

9. Husband and wife must join in detinue for slaves of the wife detained before and at the time of the marriage. *Norfleet* v. *Harris*, 564.

See Evidence, 7; Pleading & Practice, 5, 7.

INDICTMENT:

1. The words "good and lawful men," in the caption of an indictment, inquest, &c., mean freeholders. *State* v. *Glasgow*, 176.

2. If a public officer, entrusted with definite powers to be exercised for the benefit of the community, wickedly abuses or fraudulently exceeds them, he is punishable by indictment, though no injurious effects result to any individual from his misconduct. The crime consists in the public example, in perverting those powers to the purposes of fraud and wrong, which were committed to him as instruments of benefit to the citizen and of safety to their rights. *Ib.*

3. The Secretary of State of the State of North Carolina, whose duty it was under an act of the Legislature to issue land-warrants under certain circumstances, was held liable to be indicted in the courts of this State for fraudulently issuing such warrants, though the title to the lands for which the warrants were issued was in the United States, and not in this State. *Ib.*

4. In an indictment for murder where the letter "a" was omitted in the word "breast" in describing the place of the wound, judgment was for that cause arrested. *State* v. *Carter*, 319.

5. The court will not quash an indictment for petit larceny, unless the defect be very plain and obvious. Hence they refused to quash where the caption of the indictment was as follows: "State of North Carolina, Franklin county, March Sessions, 1798." *State* v. *Jeffreys*, 441.

6. An indictment, charging the offence to have been committed in November, 1801, and in the 25th year of American Independence, held to be bad, and the judgment arrested, because the offence is charged to have been committed in two different years. *State* v. *Hendricks*, 445.

7. Where there was an indictment for perjury on an affidavit to *continue a cause* and the defendant found not guilty, and then an indictment on the same affidavit *with intention to procure an attachment to issue;* it was held that the proceedings on the first indictment did not support the plea of "former acquittal" to the second. *State* v. *Williams*, 528.

See Forcible Entry & Detainer; Forgery; Jurisdiction, 4; Larceny.

INJUNCTION:

Where a sheriff had levied an execution on goods, and upon an injunction from a Court of Equity being served on him, had redelivered the goods, *it was held*, that he was not liable to the plaintiff, though no security had been given for the injunction. *Tagert* v. *Hill*, 283.

See Limitations, Statute of, 2.

INTEREST:

1. In Equity, as a general rule, interest upon interest is not allowable. But when the sum is ascertained and the annual payment of it forms part of the contract; where it is so specific that an action of debt may be sustained, and interest recovered by way of damages for the detention, and particularly where the payment of the principal sum is postponed to a very distant period, upon the faith of the regular and punctual discharge of the interest, interest upon interest ought to be allowed. *Kennon* v. *Dickens*, 435.

2. Interest will continue to accrue on a debt, if the creditor were in this country when the debt became due, although he be afterwards absent without leaving an agent. *Ogden* v. *King*, 505.

3. A debt contracted and partly paid before the mode of applying payments and calculating interest was changed, is subject to the present rule of calculation. *Yancy* v. *Mutter*, 560.

JOINT TENANCY:

A widow and two children were joint tenants of a slave; upon the marriage of the widow, the joint tenancy is severed between her and the children, and between the children, by the act of 1784, (1 Rev. Stat., ch. 43, sec. 2); and in trover by one of the children for the slave, he shall recover but one-third of the value. *Witherington* v. *Williams*, 83.

See Devise, 5.

JUDGMENT:

1. The Superior Courts cannot reverse one of their judgments given at a former term for error in a matter of law; but if it be absolutely void, or taken irregularly against the known rules of the court, they will set it aside at any time on motion. *Anonymous*, 91.

2. It is only where the question between the parties has been once decided upon confession or verdict, that the judgment can be pleaded in bar to another action; therefore where a plea of *nul tiel record* to a *sci. fa.* reciting a judgment against James H. Green, was found for the defendant, because the judgment was agaist James Green, *it was held*, not to be a bar to a *sci. fa.* reciting a judgment against James Green. *Benton* v. *Duffy*, 229.

3. A party is not bound by a judgment to which he is neither party nor privy. *Williamson* v. *Kilbie*, 268.

4. To an action of debt on the judgment of a court of record in a sister State, *nil debet* is a bad plea; it should be *nul tiel record*. *Wade* v. *Wade*, 538.

See Justice's Judgment.

JURISDICTION:

1. The Legislature of this State cannot define and punish crimes committed in another State. *State* v. *Knight*, 44.

2. If the nominal plaintiff reside out of the State, the defendant may be sued out of his own district, if the suit be brought in the district in which the real plaintiff is an inhabitant. *Anonymous*, 94.

3. The civil division of the State into counties, &c., must be taken notice of judicially by the courts. *State* v. *Glasgow*, 176.

4. While the law was, that all simple assaults should originate in the county court; where an indictment was found in the Superior Court "for assault with intent to murder," and upon a trial the jury found the defendant not guilty "of the assault with intent to murder, but guilty of an assult," *it was held*, that the Superior Court had jurisdiction to pronounce judgment on the defendant. *State* v. *Campton*, 200.

5. The question of "prize or no prize" is exclusively of admiralty jurisdiction; even though the vessel captured was not carried in for condemnation. *Simpson* v. *Nadeau*, 245.

6. Under the act fixing the jurisdiction of the County Courts at twenty pounds, the defendant should have pleaded that the sum due was less than twenty pounds when the action was commenced—otherwise the court will not, on motion, after verdict, finding less than twenty pounds, set aside the verdict and enter a nonsuit. *Brooks* v. *Collins*, 425.

7. Where a suit was brought against a party who lived in another district, and a judgment by default taken, which was afterwards set aside on condition of the defendant's pleading to the merits of the cause only, and upon the trial the plaintiff recovered less than fifty pounds, *it was held*, that a nonsuit must be entered. *Waggoner* v. *Grove*, 563.

JURY:

If a prisoner challenge peremptorily more than thirty-five jurors on a capital trial, the challenge shall be disallowed. *State* v. *Gayner*, 392.

See Costs, 4.

JUSTICE'S JUDGMENT:

The judgment of a justice does not bind lands; and if the defendant sell his lands before the levy of a justice's judgment upon them, the purchaser will acquire a good title, though the levy be afterwards returned to court, and the lands be sold under an order of court for that purpose. *Den on dem. of Cresman* v. *George*, 17.

JUSTICE OF THE PEACE:

A civil action is maintainable against a justice of the peace, acting in his office out of court, either maliciously, oppressively or corruptly. *Hardison* v. *Jordan*, 512.

LANDS OF DECEASED DEBTORS:

1. A *sci. fa.* against an infant heir to charge lands may be served on a guardian appointed by the court *pro hac vice*, but there should regularly be a guardian appointed by the proper court before the *sci. fa.* issued. *Gardner* v. *Ellis*, 62.

2. Lands in Virginia descended are equitable assets, and charge the heirs in this State with the debts of their ancestry due by specialty and binding his heirs; and if the heirs have sold the land and received the value, a decree shall be made against them for that amount. *Hamilton* v. *Hayes*, 480.

LARCENY:

Larceny may be committed of a slave: therefore in an indictment under the act of 1799, (1 Rev. Stat., ch. 34, sec. 10,) for stealing a slave, it is not necessary to add "with the intention to sell or dispose of to another, or to appropriate to his own use," as that is implied in the charge of stealing. *State* v. *Hall*, 76.

SEE INDICTMENT, 5.

LEGACY:

1. If a testator bequeath a negro woman to A. and her future increase to B. and others, the children of the woman born after the death of the testator will go to the legatees B. and others. *Mullington* v. *Shipman*, 243.

2. The children of a female slave who is specifically bequeathed, if born after the execution of the will and before the death of the testator, go to the residuary legatee. *Jones* v. *Jones*, 396.

LIMITATIONS, STATUTE OF:

1. To a plea of the statute of limitations of 1715, to debt on a bond by a British subject, replication of the treaty of peace of 1783, is bad. *Miller* v. *Gordon*, 130.

2. An injunction or order of the Court of Equity, directing a promissory note to be deposited with the Clerk and Master,

by which the plaintiff was delayed in bringing his suit, will not prevent the commencement or stay the operation of the statute of limitations. *Vance* v. *Granger*, 203.

3. Where the commissioner appointed to settle the army accounts issued a certificate in the sheriff's favour upon which the defendant drew the money, *it was held*, that the plaintiff's cause of action then accrued, and that a lapse of three years thereafter would bar him. *Coomer* v. *Little*, 223.

4. A reference to arbitrators will take a case out of the statute of limitations. *Colkings* v. *Thackston*, 225.

5. A forbearance to sue for more than seven years after the death of a testator and qualification by his executors, will bar the claim under the act of 1715, notwithstanding the act of 1789—(see 1 Rev. Stat., ch. 5, sec. 11 & 12). *Dry* v. *Roper*, 397.

6. If a tenant in tail aliens in fee and dies, leaving the issue in tail free from any of the disabilities mentioned in the statute of limitations, and such issue neglects to enter or make claim for seven years after the death of his ancestor, he and his issue will be forever barred. *Wells* v. *Newbolt*, 450.

See Executors and Administrators, 8; Pleading and Practice, 6, 8, 19, 20, 21; Possession.

MILLS:

In an action for overflowing the plaintiff's land, he need not prove his title, though it be set forth in the declaration, for possession alone is sufficient to support this action against a wrong doer. *Yeargain* v. *Johnston*, 56.

MURDER:

See Bail, 2; Indictment, 4.

NEW TRIAL:

1. If justice be done, the court will not grant a new trial on account of misdirection. *Miller* v. *White*, 135.

2. In a hard action, where the jury have found for the defendant, whose conduct has been *bona fide*, and the practice under which he acted as a public officer has been general, though perhaps not strictly consonant to law, the court will not grant a new trial. *Tagert* v. *Hill*, 283.

PARTIES:

All persons interested should regularly be made parties to a bill, but where the enforcement of this rule would be attended with inconvenience, as where there are a great many persons interested in the same right, this rule may be dispensed with; but some of the persons interested must be named as complainants, and it will not be sufficient for the bill to be filed by a mere agent or attorney of the persons interested. *Marshall* v. *Lovelass*, 325.

PARTITION:

See Evidence, 6.

PARTNERSHIP:

1. Two partners may draw a note payable to one of them, and the assignment by him will bind the other. *Blake & Green* v. *Wheaton*, 49.
2. The representative of a deceased partner cannot be sued while there is a surviving partner. *Burgwin* v. *Hostler*, 75.

PENAL ACTIONS:

1. In penal actions the material facts on which the action depend must be stated with precision, and therefore, where the declaration only alleged by way of recital, as "whereas the said defendant having," &c., it was held bad. *Harrington* v. *McFarland*, 476.
2. None of the statutes of jeofails, not even the act of 1790, extends to penal actions. *Ib.*

PLEADINGS AND PRACTICE:

1. A master in equity cannot act as a solicitor in his own court, and a bill filed by him will be dismissed. *Anonymous*, 5.
2. If a party and his witness are absent, the court will require that the absence of the party be accounted for, before they continue the cause. *Crites* v. *Lanier*, 12.
3. If an erroneous judgment be rendered on a plea in abatement, the defendant may either appeal from it or plead in chief, and upon a second erroneous judgment assign errors upon the whole record. *State* v. *Quinnery*, 25.
4. On a *sci. fa.* to revive a judgment, if the defendant plead that he was formerly imprisoned for the same debt, the plea is bad for want of shewing how he was discharged. *Ballard* v. *Averitt*, 48.

5. If a *feme covert* sue in her own name for the amount due for her attendance as a witness during coverture, she shall recover, if her marriage be not pleaded in abatement; advantage of it cannot be taken on a motion for a nonsuit. *Newton* v. *Robinson*, 50.

6. A plea of the statute of limitations, not being a plea to the merits, shall not be added after the pleadings are once made up: therefore an executor shall not be allowed to add the plea of the act of 1715, (see 1 Rev. Stat., ch. 65, sec. 11,) if he neglect to plead it at first. *Campbell* v. *Hester*, 54.

7. A married woman may file a bill for separate maintenance against her husband in her own name without a *prochein ami*. *Knight* v. *Knight*, 71.

8. Judgments obtained against an administrator in other suits, shall not be pleaded after the pleadings are once made up. *Grier* v. *Comb*, 85.

9. Where the plaintiff sued in his surname with his title of courtesy, and there was a plea in abatement that his Christian name was not inserted; a replication that he was as well known by his title of courtesy as by his Christian name is bad. *Labat* v. *Ellis*, 92.

10. Where the defendant's attorney informed the plaintiff's attorney at one term, that he should file a plea in abatement and then failed to do so, the plaintiff at the succeeding term, was allowed to enter judgment as of last term, and execute his writ of enquiry *instanter*. *Henderson* v. *Scurlock*, 133.

11. In a writ of error, the errors must be assigned when the writ is filed, which must be fifteen days before the Superior Court. *Guion* v. *Shephard*, 165.

12. A writ of error may be granted upon notice to the attorney at law who obtained the judgment, when the party resides out of the State. *Leak* v. *Murchie*, 170.

13. When a defendant is served with a copy of a decree of the Court of Equity and refuses to perform it, an attachment is the proper mode of compelling performance. *Armstrong* v. *Beaty*, 171.

14. A default should not be set aside the third term after it was taken nor without imposing on the defendant the usual terms of entering only such pleas as will bring forward the merits of the case. *Alston* v. *Parish*, 221.

15. On an appeal from the County to the Superior Court, the plaintiff shall not change the declaration filed in the

County Court; and if there was no written declaration, he shall be confined to the grounds of action declared below. *Davis* v. *Gibson*, 233.

16. In detinue, where no value is laid in the writ of the property sued for, the defendant should demur; he cannot after a verdict finding the value, move it in arrest of judgment. *Hutchins* v. *McLean*, 240.

17. The court, before and instead of pronouncing a judgment on a demurrer to a bill, may give leave to the party complaining to amend his bill and to state that matter, without which the demurrer would be allowed. *Marshall* v. *Lovelass*, 325.

18. A plea in abatement that the declaration was not served on the defendant, must be filed within the first three days of the term, under the act of 1777. *McFarland* v. *Harrington*, 475.

19. On a *sci. fa.* against a sheriff, issued on an amercement *nisi*, for not returning a writ to which the sheriff appears and pleads, the plaintiff is entitled to a trial at the return term of the *sci. fa.* *Hogg* v. *Bloodworth*, 531.

20. It is discretionary with the court to allow the plea of *plene administravit* to be entered after issue joined, or not, under the circumstances of the case. *Reid* v. *Hester*, 540.

21. The plea of the statute of limitations may be pleaded after issue joined, upon payment of full costs, under peculiar circumstances. *Ib.*

22. The plea of the statute of limitations may be pleaded after issue joined, if it were omitted by the inadvertence of counsel, and appears to be a conscientious defense. *Johnston* v. *Williams*, 565.

See Executors & Administrators, 7; Judgment, 1, 4.

POSSESSION:

1. When a tract of land is, as to part, included in A's deed or patent, and the same part is also included in B's deed or patent, and each grantee is settled upon that part of the tract, comprised in his deed, which is not included in both deeds, the possession of the part included in both deeds is in him, whose deed or patent is the oldest; but if one of them is actually settled upon such part included in both deeds for seven years together, the possession is his, and the other will be barred thereby. *Bryan* v. *Carleton*, 59.

2. Possession without color of title will not avail anything under the statute of limitations. *Cobham* v. *Ashe*, 74.

PRISON BOUNDS:

A bond to keep the prison bounds need not be proved by the subscribing witnesses, for it must, under the act authorizing it, be deemed a record, so far as concerns proof of its execution. *Wynne* v. *Brickell*, 87.

PRESUMPTION OF PAYMENT:

A writ sued out against a person who was named executor but renounced the office, is not evidence to rebut the presumption of the payment of a bond twenty years old. *Quince* v. *Ross*, 97.

RIGHT OF ENTRY:

1. A mere right of entry cannot be sold or conveyed to another. *Den on Dem. of Farrar* v. *Hamilton*, 7.
2. A right of entry cannot be transferred while another person is in the adverse possession of the land. *Cobham* v. *Ashe*, 74.

SET-OFF:

1. When a chose of action is assigned for value received, no debt contracted, or liability incurred, subsequently shall be allowed even at law as a set-off against the assignee, especially if there be an act of the Legislature taking notice of the assignment and enabling the assignee to sue in his own name. *Hogg* v. *Ashe*, 145.
2. Where a party cannot sue in his own name on a note, having but an equitable interest therein, he cannot, except under special circumstances, avail himself of it by way of set-off. *Wofford* v. *Greenlee*, 212.

SHERIFF:

1. A sale of land by the sheriff is valid, though he does not return the execution. *Den on Dem. of Farrar* v. *Hamilton*, 7.
2. A sheriff, who abstains from selling property which it was his duty to have sold, may recover on a written promise of indemnity for not selling if he believed at the time that he had no right to sell. *Joyce* v. *Williams*, 20.
3. A purchaser at a sheriff's sale is not bound to look farther than to see that he is an officer who sells, and that he is empowered to do so by execution. He is not affected by the irregular conduct of the sheriff. *Blount* v. *Mitchell*, 80.

4. When a sheriff levies on personal property, he should take it into actual possession, and have it present and shewn to the bidders at the time of sale. *Ib.*

5. If by consent a large quantity of effects are put up together, sold at one bid and purchased by the plaintiff, who colludes with the defendant to defeat the claims of the other creditors, the sale is void. *Brodie* v. *Seagraves*, 90.

6. A purchaser at an execution sale is not affected by the irregular conduct of the officer. *Ib.*

See Pleading and Practice, 18.

SLAVES:

1. Negroes are presumed to be slaves until the contrary appears; not so with respect to persons of mixed blood. *Gobu* v. *Gobu*, 100.

2. The act of 1791, relative to the killing of slaves, is too uncertain to warrant the court in passing sentence of death upon prisoner convicted under it. *State* v. *Boon*, 103.

3. Under the act of 1741, (Iredell's Rev., ch. 24,) authorizing the County Courts to pass such judgment upon a slave convicted of any other crime or misdemeanor than conspiring to rebel or making insurrection (for which the punishment of death was prescribed) as the nature of the crime or offence shall require; the court cannot pass sentence of death for any crime or offence for which a freeman would not also be liable to be so punished. *State* v. *Sue*, 189.

4. Slaves cannot take anything under a devise for their maintenance. *Cunningham* v. *Cunningham*, 432.

See Gifts of Slaves.

SURETY:

One surety cannot sue another for contribution at law. *Carrington* v. *Carson*, 323.

TAXES:

Where taxes were due on land for two years, and the sheriff sold the land for the taxes of the first year for a sum sufficient to pay the taxes of that year, but not those of the last year; *held*, that the land in the hands of the purchaser was not liable for the taxes of the last year. *State* v. *Cole*, 224.

TENANT IN COMMON:

When three tenants in common sell their estate at auction, confining the bidding to themselves, the purchaser must pay to the other two the whole amount he bids, and not *two-thirds* only, *Dickerson* v. *Collins*, 501.

SEE ESTOPPEL.

TRESPASS:

1. If an action of trespass be brought for killing a slave, pending an indictment for the same fact, and the indictment be first tried and the defendant acquitted of the felony, that proves that the trespass never was merged, and the plaintiff may proceed in his action. *State* v. *Weaver*, 42.

2. No man can be allowed to assert a right to property by violence; hence if the owner of a slave, by force, take him from the possession of one who holds him, he is liable to an action of trespass. *Blount* v. *Mitchell*, 80.

3. Possession will support trespass against a party, who interrupts that possession by force. *Pearson* v. *Smith*, 444.

TROVER:

Trover is founded on the right of property exclusively, and therefore the plaintiff cannot recover, if defendant prove property in another when the conversion took place. *Hostler* v. *Skull*, 95.

USE AND OCCUPATION:

SEE ASSUMPSIT, 1.

USURY:

Where A. had a judgment and execution against B. and on the day of sale consented to indulge B. in consideration of a sum more than the legal interest for the time of indulgence, and afterwards the judgment together with this sum was paid; *it was held* that this was usurious, and that A. was liable in an action for the penalty, under the statute against usury. *Carter* v. *Brand*, 167.

VARIANCE:

SEE BAIL, 3; WRIT OF ERROR, 2.

WARRANTY:

A full price paid for an article always implies a warranty of its soundness; and in an action on the implied warranty, the plaintiff need not prove the return of the thing bought. *Toris* v. *Long*, 13.

WASTE:

1. The action of waste will lie in this State. *Bright* v. *Wilson*, 163.
2. If is not error for the judgment in an action of waste to be for the damages only and not also pro the place wasted. *Ib.*

WILLS:

1. A will of real estate in writing may be revoked by parol; but the words of revocation must denote a present intention to revoke. Therefore where a devisor directed the person with whom his will had been deposited to burn it, who refused to do so, but said he would deliver it to the testator to be by him disposed of as he pleased; but it was not delivered back however, and the testator afterwards said the will should stand, *it was held*, that there was no revocation. *Giles* v. *Giles*, 290.
2. A revocation of a will of real estate carried completely into effect cannot be revived by any subsequent declaration by parol. *Ib.*

See Devise, 1; Evidence, 3; Legacy.

WITNESS:

1. A collector of arrearages, whose commissions depend upon the amount of the recovery in the suit, is not a competent witness to prove a fraud against a defendant charged with fraudlently buying a sheriff's property. *Treasurer of the State* v. *Nall*, 4.
2. The husband of the widow of the lessor of the plaintiff's ancestor, may be a witness for the plaintiff. *Den on dem. of Beatty's Heirs* v. ———, 7.
3. Where a witness is called by one party and examined to a particular fact, and is afterwards cross-examined by the other party as to other facts, the party first calling him cannot object to his testimony on the ground of interest. *Den on dem. of Farrar* v. *Hamilton*, 7.
4. On an indictment for perjury, the person against whom the defendant testified, and upon whose testimony he was convicted upon a charge for an assault and battery, is a competent witness. *State* v. *Hasset*, 40.
5. The witnesses of the prevailing party could not, after the act of 1783, (see New. Rev., ch. 189, sec. 3,) warrant for their attendance after judgment in the suit. *Stanly* v. *Hodges*, 115 & 413.

WRIT:

A writ must be attested as well as signed by the Clerk of the Court from which it issues. *Buchannon* v. *Kennon*, 530.

WRIT OF ERROR:

1. A writ of error is, in this State, a writ of right to which a party is entitled upon complying with the requisites of the Act of Assembly. (1 Rev. Stat., ch. 4, sec. 17.) *Haughton* v. *Allen*, 277.
2. When the verdict is for more than the damages laid in the writ, the variance is fatal on a writ of error, unless the plaintiff will enter a remittitur for the surplus: And leave will be given him to do so upon paying the costs of the writ of error. *Singleton* v. *Kennedy*, 566.

SEE ATTACHMENT, 4, 7, 8, 10; PLEADING AND PRACTICE, 11, 12,